(27,298)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 543.

KNICKERBOCKER ICE COMPANY, PLAINTIFF IN ERROR,

vs.

LILLIAN E. STEWART.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals of the State of New York.

Before State Industrial Commission, Respondent.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law, Claimant-Respondent,

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

Case on Appeal.

Frank R. Savidge, Attorney for Knickerbocker Ice Company, Employer-Appellant, 45 Cedar Street, New York City.
Charles D. Newton, Attorney General of the State of New York, Albany, N. Y.
Robert W. Bonynge, Counsel for State Industrial Commission, No. 230 Fifth Avenue, New York City.
Mrs. Lillian E. Stewart, Claimant, No. 1829 Amsterdam Avenue, New York City.

1 Supreme Court, Appellate Division, Third Department.

Case No. 350,055.

Before State Industrial Commission, Respondent.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law, Claimant-Respondent,

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

Statement Under Rule 41.

This claim arose out of the death of William M. Stewart on August 3rd, 1918. He was a bargeman of the Knickerbocker Ice Company, and fell off an ice bridge at 95th Street, Manhattan, into the Hudson River. The proceeding was started by the widow's claim for compensation served about August 10th, 1918. The
2 matter was brought on for a hearing before the State Industrial Commission on September 18th, 1918, and an award of compensation to the claimant and her children was made of

$76.90 at once and $30.76 biweekly, together with $95.50 for funeral expenses. The names of the original parties are given in full above, and there has been no change in the parties or attorneys pending this proceeding.

Notice of Appeal.

State Industrial Commission.

Case No. 350,055,

Before State Industrial Commission, Respondent.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law, Claimant-Respondent,

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

Please take notice that the above named employer, Knockerbocker Ice Company, hereby appeals to the Appellate Division of
3 the Supreme Court, in and for the Third Judicial Department, from the decision and award of the State Industrial Commission, made herein on September 18, 1918, directing payment of $6.93 a week to Lillian E. Stewart, widow of the above named decedent, during her dependency, and the sum of $1.69 a week to Beatrix Stewart, infant daughter of the above named decedent, and the sum of $1.69 a week to Alida Stewart, infant daughter of the above named decedent, and the sum of $1.69 a week to William M. Stewart, infant son of the above named decedent, and the sum of $1.69 a week to Lenore Stewart, infant daughter of the above named decedent, and the sum of $1.69 a week to Lillian Stewart, infant daughter of the above named decedent, making a total award of $15.38 weekly, and from that part of the decision and award of the State Industrial Commission made herein on September 18, 1918, directing payment of $100 for funeral expenses to Lillian E. Stewart, widow of the above named decedent, and directing that the sum of $76.90 be paid to her for the period from August 3, 1918, to September 7, 1918, and that the sum of $30.76 be paid to her thereafter in biweekly installments, and from each and every part of each and every one of said awards.

Dated, New York, October 8th, 1918.

Yours, &c.,

FRANK R. SAVIDGE,
Attorney for Knickerbocker Ice Company, Employer-Appellant,
45 *Cedar Street, Borough of Manhattan, New York, N. Y.*

4 To Attorney General of the State of New York, Albany, N. Y.

State Industrial Commission, Albany, N. Y., and No. 230 Fifth Avenue, New York City, N. Y.

Hon. Robert W. Bonynge, Counsel for State Industrial Commission, No. 230 Fifth Avenue, New York City, N. Y.

Mrs. Lillian E. Stewart, Claimant, No. 1829 Amsterdam Avenue, New York City, N. Y.

Joseph H. Hollands, Esq., Clerk of the Appellate Division, Third Judicial Department, Albany, N. Y.

5 *Employer's First Report of Injury.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Division of Claims.

File No. 350,055.
Case of —.

Employer's name, Knickerbocker Ice Co. Office address, 1480 Broadway, New York, N. Y.

Business (goods produced, work done or kind of trade or transportation), Ice dealers.

Location of plant or place of work where accident occurred (if not at office address), 95th St. and North River, New York City, N. Y.

Date of accident, 3rd day of August, 1918; hour of day, 12:40 M.

Full name of injured employee, Wm. M. Stewart. Address, 1829 Amsterdam Ave., New York, N. Y.

Sex, Male. Age, 45 years. Single, married, widowed or divorced, married.

Occupation when injured? Bargeman. In what departmenut of plant or branch of work? Working on boat.

Was injured employee doing his regular work? Yes.

Q. How long was injured person in your employment? Since May 22, 1918. Piece or time worker? Time. Wages or average earnings per day? $4.00.

Describe in full how the accident occurred. When in the act of throwing a block while standing on ice bridge on dock, he lost his balance and fell backward into the water.

6 State part of person injured and nature of injury. Drowned.

In what company is Compensation Insurance carried (must be answered)? This Company carries its own risk.

Firm name: Knickerbocker Ice Company.

Signed: W. W. GALLAGHER,
Official Title: *Claim Agent.*

Signed at New York, N. Y., this 21st day of August, 1918.

Instructions.

The employer must fill out this form and return same to the Bureau of Workmen's Compensation, at its New York Office, No. 230 Fifth Avenue, within ten days after every accident which causes any loss of time other than the balance of the day, turn or shift on which the accident occurred, or which requires any medical attendance other than first aid treatment. (See penalty, section 111 of the law printed below.)

In filling out this form use pen or typewriter.

If injured employee is not fully recovered before this notice is sent by you, the Commission will send you Form No. C-11 for second notice; report thereon at proper time. (See instructions thereon.)

If employer be the State or a political subdivision thereof, give name of person with whom to correspond about a claim.

Section 111 of Workmen's Compensation Law.

Section 111.—Record and Report of Injuries by Employers.—
7 Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing by the employer to the Commission, upon blanks to be procured from the Commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the Commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

Widow's First Report of Injury.

State Industrial Commission,

230 Fifth Avenue,

New York, N. Y.

Knickerbocker Ice Company, 1480 Broadway, New York, N. Y.

GENTLEMEN:

Pursuant to Section 18 of the Workmen's Compensation Act of the State of New York, you are hereby notified that my late husband, William M. Stewart, met his death on Saturday August 3rd,
8 1918, at about 12:30 mid-day, while in the employ of the Knickerbocker Ice Co. of 1480 Broadway, New York, N. Y., as a laborer on the dock at the foot of West 95th St. and North River and engaged in unloading a barge of ice and loading the same on wagons. While so engaged he fell into the water and was drowned.

The said decedent resided at No. 1829 Amsterdam Ave., New York, N. Y., and left him surviving the undersigned, his widow, and five dependent children, under the age of 18 years.

The names and ages of said children are:

Beatrix, aged 14 years.
Alida, aged 13 years,
William M., aged 10 years,
Lenora, aged 8 years,
Lillian, aged 6 years,

all residing with the undersigned at No. 1829 Amsterdam Ave., New York, N. Y.

Dated New York, N. Y., August 10th, 1918.

(Signed) LILLIAN E. STEWART,
Widow.

Residence: 1829 Amsterdam Ave., New York, N. Y.

BERTRAND L. PETTIGREW,
Attorney for Claimant, 25 Liberty St., New York City.

9 *Form of Claim for Compensation by Widow in Death Case.*

State Industrial Commission.

230 Fifth Avenue, N. Y.

New York Office.

I hereby make claim for compensation under Section 16 of Chapter 67 of the consolidated laws. My claim arises out of the death of

Wm. M. Stewart, who died on the 3rd day of August, 1918, as a result of injury sustained on 3rd day of August, 1918, in the employ of Knickerbocker Ice Company of 1480 Broadway, New York, N. Y.

I was the wife of the deceased Wm. Stewart.

I have the following children who were under 18 years of age at the time of death of my husband:

Name.	Date of birth.
Beatrix	Feb. 11, 1904
Alida	Aug. 3, 1905
William M.	Jan. 14, 1908
Lenore	Nov. 26, 1909
Lillian	Mar. 30, 1912

I was born February 1st, 1878.

I was married to the deceased on the 29th day of May, 1901, at Borough of Manhattan, New York City, N. Y.

10 To the best of my knowledge and belief the deceased was earning at the time of the injury wages at the rate of $4.00 per day.

(Signed) LILLIAN E. STEWART,
1829 *Amsterdam Ave.,*
New York City, N. Y.

Dated this 14th day of August, 1918.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

On this 14th day of August, A. D. 1918, personally appeared before me the above named Lillian E. Stewart and made oath that the answers by her above named and subscribed are true.

ADA A. GALLIN,
Notary Public, 543 *West End Ave., New York City.*

11 *Proof of Death by Employer.*

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Stamped: Received Aug. 24, 1918.

Division of Claims.

Case No. 350055 N. Y.
Case of William M. Stewart.

In the matter of the death of William M. Stewart, late of 1829 Amst. Ave., N. Y. C., who was drowned about 12:40 P. M., on the 3rd day of August, 1918.

What is your name in full? Wm. W. Gallagher.

What is your post-office address? Rooms 1213-25, No. 1480 Broadway, N. Y. City, N. Y.

What is the name of the firm or corporation with which you are connected? Knickerbocker Ice Company.

What is the kind and character of the business conducted? Manufacturers and Dealers in Ice.

In what company is compensation insurance carried? This company carries its own risk.

What is your official title? Claim agent.

How long have you been personally acquainted with the deceased? Did not know him.

How long was he in your employ? From May 22 to Aug. 3, 1918.

In what capacity was he in your employ? Bargeman, working on boats unloading ice at wharf.

What were his average daily wages? $4.00.

12 Do you know, as a matter of personal knowledge that he was accidental-y or otherwise injured? I do not.

What are the full particulars as to how, when and where he was so injured? At about 12:40 P. M. on August 3rd, 1918, when in the act of throwing a block while standing on ice bridge on dock at 95th St. and North River, N. Y. City, he lost his balance and fell backwards into the water.

On what date did he die? August 3, 1918.

Dated at New York, N. Y., this 21st day of August, 1918.

(Signature) WM. W. GALLAGHER.

Witness to signature:
H. J. MARRE CELLA, JR.

P. O. address of witness: S. Orange, N. J.

STATE OF NEW YORK,
County of New York, ss:

On this twenty-first day of August, 1918, personally appeared before the undersigned, a Commissioner of Deeds, in and for the said county and state, the above named Wm. W. Gallagher, to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being
13 duly advised in the premises, subscribed his (her) name hereto in my presence, and made oath that the foregoing statements, and each and all of them are full and true, and are made without reservation or concealment.

[SEAL.] SIMON SVERDLIK,
Commissioner of Deeds.

Proof of Death by Undertaker.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

Stamped: Received Aug. 23, 1918.

Division of Claims.

Case No. 350055 N. Y.
Case of William M. Stewart.

STATE OF NEW YORK,
County of New York, ss:

Charles J. Coote, being duly sworn, says that he is a duly licensed undertaker of New York City, 415 1st Ave., that as such he was required on the 7th day of August, 1918, to prepare the dead body of William Stewart, who was drowned August 3, 1918, for burial; that he placed a coffin, containing the said body, in a grave in Greenwood cemetery; that he shipped said body via to that he was directed to conduct such burial by Mrs. Lillian E. Stewart, wife who authorized the following:

14

Zinc Line- Case	$50.00
Opening grave No. 1 in Lot Greenwood	10.00
P (illegible)	2.50
Hearse to Greenwood Cemetery	12.50
2 Coaches to Greenwood Cemetery	16.00
1 Coach to Ctiy Hall	4.50
Total	$95.50

That he was informed said bill would be paid by Mrs. Lillian E. Stewart (wife); that no part of said bill of expenses so authorized for said burial has been paid, except.

(Signed) CHARLES J. COOTE.

Subscribed and sworn to before me, this 22 day of August, A. D. 1918.

MICHAEL P. DALY,
New York Commissioner of Deeds,
Notary Public.

Certificate of person who made funeral arrangements will be required below unless itemized bill of undertaker endorsed "correct" by such person, is attached.

Certificate of Person Authorizing Burial.

I hereby certify that I have read the foregoing affidavit of Charles J. Coote, undertaker; that I authorized the items of expense therein amounting to $95.50 as the funeral bill (correct) of deceased workman.

(Signed) MRS. LILLIAN E. STEWART,

(NOTE.—The entire amount allowed for burial under the Workmen's Compensation Act cannot exceed $100.00.)

Letter to Employer, Dated August 19, 1918.

August 19, 1918.

Please Address reply to "A. F. Paura."

In re case #350055.

William M. Stewart, Deceased.

Knickerbocker Ice Co., Employer.

Knickerbocker Ice Co., 1480 Broadway, New York City.

GENTLEMEN:

Will you kindly complete the enclosed forms C–2 and C–19 in connection with William M. Stewart, who was fatally injured on August 3rd, 1918, while in your employ.

Trusting you will give this matter your immediate attention, we are,

Very truly yours,

STATE INDUSTRIAL COMMISSION,
DIVISION OF CLAIMS.

—— ——, *Chief.*

AEP/FR

Memorandum Signed by Lillian E. Stewart.

Received by Commission, August 23, 1918.

Mr. Stewart fell from dock and was drowned on Saturday afternoon, August 3, at 12:30. His body was recovered on Monday and taken to the morgue. The funeral services were held in the chapel of the morgue. The body was so decomposed that it was not allowed to be taken out of the morgue for the funeral services. There was no doctor called upon to examine him so far as I know. I am, therefore, unable to have the attached certificate filled out. Coroner's case.

(Signed) LILLIAN E. STEWART.

Record of Marriage.

NEW YORK, Aug. 15, 1918.

A Transcript of the Record of the Marriages Reported to the Department of Health of the City of New York,

The City of New York, Department of Health.

No. of Certificate, 9265.

Certificate and Record of Marriage, State of New York, of (Groom) William Macbeth Stewart and (Bride) Lillian Frances Crisville.

Groom's residence, 325 East 23rd Street; bride's residence, 412 East 23rd Street.

Age: 27 years; age, 23 years.

Color: White; color, white.

17 Single, widowed or divorced: single; single, widowed or divorced: single.

Occupation: —; maiden name if a widow: —.

Birthplace: New York City; birthplace; Hanford, Conn.

Father's name: Geo. C. Stewart; father's name; Wm. Chrisville.

Mother's maiden name: Margaret Macbeth; mother's maiden name: Nora Crowley.

Number of groom's marriage: first; number of bride's marriage: first.

I hereby certify that the above-named groom and bride were joined in marriage by me in accordance with the laws of the State of New York, at New York City, in the Borough of Manhattan, City of New York, this 29th day of May, 1901.

Signature of person performing the ceremony; Frank M. Goodchild; official station: minister Rose Geiser.

Witnesses of the marriage: Henry Steinfeld; residence: 228 West 43rd Street.

Date of record: June 3, 1901.

A true copy.

FANK J. MONAGHAN, M. D.,
Secretary Board of Health, City of New York.
S. W. WYNEE, M. D.
Assistant Registrar.

18 NOTICE.—In issuing this transcript of record, the Department of Health of the City of New York does not certify to the truth of the record transcribed. The seal of the Department of Health attests only the correctness of the transcript, and no inquiry as to the facts reported has been provided for by law.

Certificate of Death.

NOTE.—In issuing this transcript of record, the Department of Health of the City of New York does not certify to the truth of the statements made thereon, as no inquiry as to the facts has been provided for by law.

New York, Aug. 30, 1918.

A Transcript of a Record on File with the Department of Health of the City of New York.

State of New York.

Department of Health of the City of New York.

Bureau of Records.

Certificate of Death.

Registered No. 22827.

1. Place of death: Borough of Manhattan. No. 95th St. & North River. Character of premises, whether tenement, private, hotel, hospital or other place, etc.: —.

19 2. Full name: William Stewart.

3. Sex: M.

4. Color or Race: W.

5. Single, married, widowed or divorced: M.

6. Date of birth: —.

7. Age: 45 years.

8. Occupation: (*a*) trade, profession, or particular kind of work: Caulker. (*b*) general nature of industry, business or establishment in which employed (or employer): —.

9. Birthplace (State or country): U. S.; (*b*) How long resident in City of New York? Life.

10. Name of father: George C.

11. Birthplace of father (State or country): U. S.

12. Maiden name of mother: Margaret McBeth.

13. Birthplace of mother: Scotland.

14. Special information required in deaths in hospitals and in institutions and in deaths of non-residents and recent residents. Former or usual residence: 1829 Amsterdam Ave.

15. Date of death: August 3, 1918.

16. I hereby certify that the foregoing particulars (Nos. 1 to 15, inclusive) are correct as near as the same can be ascertained, and I further certify that I have this 6 day of August, 1918, taken charge of the body of deceased found at morgue and that I have investigated the essential facts concerning the circumstances of the death.

17. I further certify that I have viewed said body and from exam. and evidence that he died on the 3rd day of August, 1918, at — M. and that the chief and determining cause of his death was Submersion, drowning; that the contributing causes were, fell from pier at 95th Street & North River.

J. A. SONZALE,
Assistant Medical Examiner.

Approved:
CHARLES NOVIN, M. D.

Filed Aug. 6, 1918.

18. Place of burial: Greenwood Ceme.

19. Undertaker: Name, C. J. Coote; address, 415 1st Ave. Date of burial: Aug. 7, 1918.

This is to certify that the foregoing is a true copy (photographic) of a record on file in the Bureau of Records, Department of Health, City of New York.

S. W. WYNNE, M. D.
Assistant Registrar of Records.

Hearing Testimony.

State Industrial Commission.

230 Fifth Avenue, New York City.

September 18th, 1918.

D. C. #350055.

WILLIAM M. STEWART, Claimant,

—.

KNICKERBOCKER ICE CO., Employer; Eelf Insurer, Carrier.

Hearing Before Deputy Commissioner William C. Archer.

September 18th, 1918.

L. B. Siegel, Hearing Stenographer.

Appearances:

Mrs. Stewart, widow, present in person.
Mr. C. R. Neal, representing the employer-carrier.

Commr. Archer: What is the contention of the carrier?
Mr. Neal. There is a lot in detail. In the first place I will raise the constitutionality of the congressional amendment of the judicial

code, and besides that I don't believe the accident occurred in the course of his employment. Then, you figured the mathematical problem wrong. Then, I want some proof that she is the widow, and the date of marriage, etc., and where she and the children were born, etc.

Commr. Archer: Here is the widow and we can get that information right now. Be sworn.

22 Mrs. LILLIAN E. STEWART, 1829 Amsterdam Avenue, being duly sworn, testified as follows:

By Commr. Archer:

Q. Are you the widow of William M. Stewart?
A. Yes, sir.
Q. When were you married?
A. May 29th, 1901, 17 years ago.
Q. That is 17 years past?
A. Yes.
Q. At what place were you married?
A. I have it right here (handing a piece of paper looking like a certificate to Mr. Archer). There is a little misprint there, but it is pretty near right.

Mr. Neal: I am not disputing it, only I wanted to have some proof of it.

Commr. Archer: She submits a certificate of marriage, signed by "Williams, Ass't Registrar."

(Commr. Archer continuing:)

Q. Were you the wife of William M. Stewart at the time of his death?
A. Yes.
Q. How many children under 18 years of age have you?
A. Five.
Q. How old is Lillian?
A. Six years old.

Mr. Neal: Will you ask, please where they were born?

Q. What was the date of her birth?
A. 30th of March; she was six years old last March.

By Mr. Neal:

Q. She was born in New York City?
A. Yes, in New York City.

23 By Commr. Archer:

Q. And all these five children are living?
A. Yes.

By Mr. Neal:

Q. And all born in the Borough of Manhattan?
A. Yes, sir.

By Commr. Archer:

Q. What wages was your husband receiving at the time of his death?
A. Four dollars a day.

Mr. Neal: That's correct, I believe.
Commr. Archer: What is your objection that you raised regarding the wages?
Mr. Neal: There is a mistake made in the arithmetic. You make the award on the theory of what?—Section 16, subdivision 4 I Suppose?
Clerk Meuller: Yes.
Mr. Neal: On the theory that he earned more than $15 a week.
Commr. Archer: As to the wife and children.
Mr. Neal: $1,200 a year.
Commr. Archer: That's Section 14.
Clerk Meuller: Yes, $100 a month.
Mr. Neal: That's the basis I suppose.
Commr. Archer: 4x300, divided by 52. Numbered paragraph 1 is the rule we use. It is paragraph 1 and 4 together; it is not dividing $1,200 by 52.
Mr. Neal: The result is the same.
24 Commr. Archer: Yes, the question is not that we use paragraph 4 alone.
Mr. Neal: We never will appeal on the arithmetic; it is only whether you multiply and divide right.
Commr. Archer: It will give the same figures but it is not the rule we use. Now what are the other questions you raised?
Mr. Neal: Through an examination to find out exactly what happened.
Mr. Archer: The employer says "At 12:40 P. M. on August 3rd, 1918, when in the act of throwing a block while standing on ice bridge on dock at 95th Street & North River, New York City, he lost his balance and fell backwards into the water."
Mr. Neal: Yes.
Commr. Archer: Is that all right? We will accept that as your statement if that is your statement.
Mr. Neal: That statement is substantially correct but it wasn't in the course of his employment. That was not in the course of his work.
Commr. Archer: Mr. Gallagher, the Claim Agent for the Employer says it was in the course of his employment and in the course of his regular work, in the First Report of Injury of the employer. These are the questions asked and answers given: "Occupation when injured? Bargeman. In what department of plant or branch of

work? Working on boat. Was injured employee doing his regular work? Yes." Do you want to go into that a little more carefully?

Mr. Neal: Yes.

25 Commr. Archer: Have you any witnesses?

Mr. Neal: Yes.

Commr. Archer: Call them.

Mr. PATRICK L. NORMANDEAU, 374 West 127th Street, New York City, being duly sworn, testified as follows:

By Mr. Neal:

Q. In whose employ were you on August 3rd, 1918?
A. Knickerbocker Ice Co.
Q. Where did you work for them?
A. 95th Street and North River.
Q. What was the nature of the employment?
A. Boat master.
Q. Were you in charge of that particular plant?
A. Yes.
Q. Were you there at the time of the accident to William M. Stewart?
A. Yes.
Q. What were the nature of Stewart's duties?
A. Bargeman.
Q. And what did those duties consist of?
A. Pulling ice in the boat and hooking on ice.
Q. What work had he been doing during the day?
A. That's all he was doing, working in the boat.
Q. And what time did the accident happen?
A. Twenty minutes of one.
Q. What was being done at the time?
A. Taking down the rigging on the barge.
Q. And what were you going to do, close up for the season?
A. Yes.

26 Q. Had Stewart's work for the day terminated?
A. No, not then.
Q. When did it terminate?
A. Four o'clock.
Q. Was there any boat lying there in the river?
A. Yes.
Q. Was it in the Hudson River?
A. Yes.
Q. Where did the ice come from?
A. Somewhere up the Hudson River.
Q. It was brought down the Hudson River?
A. Yes.
Q. What, if any, instructions had you given this man Stewart at the time prior to the accident?
A. I had given all the rest of the men but not him, instructions to take down the rigging.

Q. To take down the rigging?
A. Yes.
Q. And did you tell Stewart anything?
A. No, but I told him not to go on the bridge.
Q. You told him not to go on the bridge?
A. Yes.
Q. Anything else?
A. No.
Q. You told him nothing about taking down rigging?
A. No.

By Commr. Archer:

Q. What was he doing on the bridge?
A. At that time?
Q. Yes?
A. Looking around watching us work

By Mr. Neal:

Q. Did you give him any instructions not to help you?
A. Yes.
Q. You gave him distinct instructions not to help you take down the rigging?
A. Yes.
Q. What did you say to him about not taking down the rigging that day?
27 A. I said "All you fellows go up there and take down that rigging and you Stewart stay down; you can't go up there."
Q. Explain the physical condition of the man Stewart?
A. He was a cripple, he was lame and couldn't go up there.
Q. What was the nature of his crippled condition?
A. He had a short leg, something the matter with his hip and he limped.
Q. And anybody engaged in the taking down of the tackle required what?
A. Had to climb up poles, to hoist the ice out of the ice box boat, they had some tackle up there to take the ice out of the box boat but we never had opportunity to use that and I told them to take it down but I told Stewart to stay down and not to go up there.
Q. He was a bargeman and worked inside of the boat, pulling the ice up or pulling it over to the hatch?
A. Yes.
Q. And you told him not to help in taking down this rigging?
A. Yes, sir.

Mr. Neal: That's all.

Commr. Archer: The employer in his report says he was in the act of throwing a block while standing on the ice bridge, that he lost his balance and fell in the water.

Mr. Neal: He (meaning witness) doesn't know that; that's the fact; the next man will show that. The next man saw the accident.

Commr. Archer: You said he was working that day—I will ask this man a few questions.

By Commr. Archer:

Q. You say he was working that day and he was on the payroll of the company?

28 A. He worked in the boat; at this time there were no wagons there and we were going to close there and as there was nothing doing I had the men take down the rigging.

Q. And Stewart came around to watch the work being done?

A. Yes, the men never stayed in the boat while there was no wagons there.

Q. And what orders did you give him?

A. I said "You leave the other men do the work," because I knew he was unable to get up there.

Q. When did you tell him that?

A. Before we went to take down the rigging.

Q. Did anybody hear you tell him that?

A. I wouldn't say positively, maybe the other men did hear me. I am not sure about that.

Q. You say he couldn't get up on the ice bridge?

A. Yes, on the bridge but not on these "skinny legs," it is——

Q. (Int'g.) What is the ice bridge?

A. On the dock, and these things are above that.

Q. What are they?

A. What we call "skinny legs" sort of working with a block and fall to hoist ice out of the box boat.

Q. And when it comes out of the box boat you swing it around?

A. No, no, it stands perpendicular and we lay it over and away when the ice comes in.

Q. It was really a platform?

A. Yes.

Q. Reaching from the dock?

A. No, the boat comes to the edge of the dock, where the wagon is backed into it.

Q. And this was a board laid from the dock to the wagon?

A. It is laid from the platform so you can swing the ice up over the boat.

Q. What is the ice bridge?

A. This platform, on the side of the dock.

29 Q. Is it permanent there?

A. Yes.

Q. Is it attached to the dock?

A. Yes, it was built there.

Q. And he was standing on that platform?

A. Yes.

Q. And you told him not to stand there?

A. No.

Q. What did you tell him?

A. I told him in the office, my office is just beyond there, I said,

"You needn't bother, leave these men do the work," and he went up there.

Q. Was he not allowed to stand where he was standing?

A. They all went up there, in fact everybody, they generally stay around there.

Q. And he was sitting there?

A. Walking up and down there.

Q. And he had the right to be where he was?

A. Yes, as far as that goes. I couldn't compel these men to stay in the boat.

Q. Was it on the property of the Knickerbocker Ice Co.?

A. Yes.

Q. What time of the day was it?

A. Twenty minutes to one.

Q. That wasn't the lunch hour?

A. No.

Q. What are the hours?

A. Four to four.

Q. What is the lunch hour?

A. Two hours in the morning, or an hour in the morning and an hour in the afternoon.

Q. This was not the intermission for lunch?

A. No, sir.

Commr. Archer: Call our next witness.

Mr. Neal: The contention is that he was a mere volunteer in throwing this board or block and he was acting contrary to instructions when he did it.

Commr. Archer: All right; call your next witness.

30 Mr. CHRISTOPHE DUFF, 441 East 121st Street, New York City, being duly sworn, testified as follows:

By Mr. Neal:

Q. You were in the employ of the Knickerbocker Ice Co. on August 3rd, 1918?

A. Yes, sir.

Q. At the same time Mr. Stewart was working for them?

A. Yes.

Q. And Mr. Normandeau was your boss?

A. Yes.

Q. And you were the assistant?

A. Yes.

Q. Tell me what was the kind of work that Mr. Stewart did there at that time?

A. He was a bargeman, hooking on ice.

Q. Did he work about boats or in boats?

A. Yes.

Q. All the time?

A. Yes.

Q. What was the nature of his work?

A. That was his work there, what I told you, he was bargeman.
Q. Tell me just what happened?
A. They were going to take the bridge there and close up, and the last I seen Stewart was he pitched a block over to me and said, "Take that in," and I was working and paid no attention and the first thing I heard was a noise. I didn't see him fall.
Q. He threw a block to you and you heard a splash?
A. Yes.

By Commr. Archer:

Q. Did you catch the block?
A. It was on the floor, just a few feet from me,—he was 25 to 30 feet from me at the time, on the bridge.

By Mr. Neal:

Q. You say he started to throw the block and then you heard a splash?
A. It was a couple of seconds after that, but I didn't hear
31 him fall, I heard a noise, but I didn't see him fall.
Q. That is you didn't see him fall into the water, all you heard was a splash?
A. Yes.
Q. You and two other men were engaged in taking down a derrick and rigging which you had used to remove the ice from the boat, at that time?
A. Yes.
Q. Was this man Stewart engaged in helping you?
A. Those men were up on this rigging but higher up, but he stood on the platform and threw this block to me and said, "Take that too."
Q. Was that the only thing you saw him do in connection with the rigging?
A. That's all.
Q. Did you ask him to help you?
A. No.
Q. Did you hear Mr. Normandeau have any conversation with Mr. Stewart about not helping to take down the rigging?
A. No, sir.
Q. You heard no conversation?
A. No, sir.

Commr. Archer: Any further testimony?
Mr. Neal: No further testimony except the employer wants to offer in evidence the fact it is a New Jersey Corporation. I would like not to leave the certificate here.
Commr. Archer: Just assert it.
Mr. Neal: It is a fact and I offer proof of that by bringing in the certificate of the Secretary of State and the articles of incorporation.
Commr. Archer (looking at the certificate): This being the certificate:

STATE OF NEW YORK:

Office of the Secretary of State.

It is hereby certified that the Knickerbocker Ice Co., which appears from the papers filed in this office on the 4th day of
32 May, 1911, to be a foreign stock corporation, organized and existing under the laws of the State of New Jersey, has complied with all requirements of law to do business in this State, and the business of such corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business.

Witness my hand and seal of office of the Secretary of State, at the City of Albany, this 4th day of May, 1911.

JOSEPH E. PIDGEON,
Second Deputy Secretary of State.

Mr. Neal: It appears the particular state of incorporation is New Jersey, without getting any more of this in the record.

Commr. Archer: Yes, it so appears.

Mrs. Lillian Stewart: I just want to say a few words. I saw them loading ice on four ice wagons at four o'clock that afternoon.

Commr. Archer: Saw him?

Mrs. Stewart: The men on the boat. I saw the men on the boat; I was coming from Jersey, from the American Can Co. with my salary at 4 o'clock and I didn't know my husband was drowned, and there was four ice wagons there being loaded, and my husband must have been drowned then, because I didn't hear anything of it until half past six that night. I went there at night to see if I could see the Captain of the boat that he was drowned from and they told me that boat had gone and another boat had come in its
33 place and I couldn't get any information of the man and they said my husband had fallen from a certain spot and pointed out that spot to me, and he was not standing on this place where this man said he was standing.

Commr. Archer: Where was he?

Mrs. Stewart: There is a slide where they unload the ice from the dock and this slide comes from the bridge of the boat to the dock and slides on, and my husband must have been unloading it there because it was right above the spot they claimed he fell from; and another thing I want to say, he must have been stunned to be drowned because he was a very able swimmer and otherwise his physical condition while he had hip disease as a boy, he was a very strapping man, he was strong and a good worker, I have no doubt of that. He was always very careful of himself.

Commr. Archer: Award as recommended.

Mr. Neal: Just a moment. The record isn't complete. I object to an award on the grounds, first, it doesn't appear the man suffered his accident in the course of his employment; also on the

ground it appears he was engaged in a maritime pursuit and that under Article 3, Section 2 of the Federal Constitution, it being a case of a maritime jurisdiction, that the courts have exclusive jurisdiction. On the further ground the amendments to Sections 24 and 256 of the judicial code by Congress enacted, and signed by the President on October 6, 1917, is not constitutional and in violation of the Constitution of the U. S. and made in excess of the
34 powers of Congress under the powers of the Constitution.

Commr. Archer: Award as recommended. My conception of the law with respect to prohibitive orders, that is violation of prohibitive orders, is as follows: Namely, prohibitive orders are divided in two classes, those which limit the scope of employment and those which limit the employment within the scope of employment. A violation of the former takes an employee outside of his employment, a violation of the latter does not. This clearly falls under the latter class and does not deprive the claimant of compensation.

Mr. Neal: I don't particular- disagree with that. Do you want to make a statement as to whether he was engaged in a maritime occupation?

Commr. Archer: I think he was.

Mr. Neal: The reason I ask that is because somebody will raise the question whether Congress exceeded its authority and what I want to do is to decide within the next ten days whether we will take the question up. You see, Mrs. Stewart, we have thirty days within which to appeal, but I will decide within ten days whether we will take the question up or whether we will pay the claim.

Commr. Archer: All right, award as recommended. (To Mrs. Stewart:) You see the law gives them that right and they are within their rights when they do that. However, you will hear from them very shortly and you will get a notice from us telling you
35 how much is due you and when you receive that notice take it to the office of the company for payment.

September 24th, 1918.

I hereby certify that the foregoing is a true and correct transcript of the testimony taken at the above hearing before the State Industrial Commission on September 18th, 1918.

LEO B. SIEGEL,
Hearing Stenographer, State Industrial Commission.

Notice of Hearing.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

J. M.

Division of Claims.

Case No. 350055 N. Y.
Case of William M. Stewart,

Mrs. Lillian E. Stewart (Claimant), 1829 Amsterdam Ave., City: Knickerbocker Ice Co. (Employer), 1480 Broadway, City:

Instructions.

If you desire to file objection to this disposition of your case please do so in writing on the back of this sheet. Then mail it before the day of the hearing to the State Industrial Commission, 230
36 Fifth Avenue, New York City. Bureau of Workmen's Compensation.

You are hereby notified that this claim seemingly is complete and that it will be summarized and presented to the Commission on Wednesday, Sept. 18, 1918, at 10 o'clock at No. 230 Fifth Avenue, New York, Room 2015.

The Division of Claims will recommend that an award be made of $76.90, being for 5 weeks at $11.54 per week; bi-weekly $30.76, Funeral Expenses $95.50, and that the case be closed.

Date this notice mailed, Sept. 13, 1918, by J. M.

NOTE.—For the first sixty days after injury the employer shall furnish medical, surgical and hospital services and medicines to his injured workmen. Injured workmen must request this service of the employer in writing, otherwise the injured workmen may have to pay his own bills. If he requests it in writing the employer will have to furnish medical service. The request is contained in the first notice of injury. The injured workman must give his employer notice of injury in writing within ten days after disability. If the employer has insured the medical services in the State Insurance Fund, then the bills for such services will be paid out of the State Insurance Fund and not by the employer.

The law provides that no compensation shall be paid for the first fourteen days of disability unless the injury results in a disability of more than forty-nine days' duration. In such cases compensation will then be paid for the first two weeks also. Compensation
37 is paid upon the basis of two-thirds of the average weekly wage. The following method of arriving at the average weekly wage is prescribed by law: Multiply daily wage by 300 and

divide by 52. This will give you the weekly wage, two-thirds of which is the compensation rate in disability cases.

STATE INDUSTRIAL COMMISSION,
JOHN MITCHELL,
Chairman.

Notice of Award in Death Cases.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

G. O. R.
Case No. 350055 N. Y.

Date Sept. 25, 1918.

William M. Stewart, Deceased.

To Knickerbocker Ice Co., Employer, 1480 Broadway, N. Y. C., and Mrs. Lillian E. Stewart, Claimant, 1829 Amsterdam Ave., N. Y. C., and Self Insurance Carrier:

This is notice that at a meeting of the State Industrial Commission held 9/18/18 a decision and award of compensation was made in the above case as follows:

38 $6.93 per week being 30% of $23.08 (average weekly wages) to be paid to widow, born 2/1/78, during period of widowhood.

$1.69 per week being 7 1-3% of $23.08 to William M., son, born 2/11/04.

$1.69 per week being 7 1-3% of $23.08 to Alida, daughter, born 8/3/05.

$1.69 per week being 7 1-3% of $23.08 to William M., son, born 1/14/08.

$1.69 per week being 7 1-3% of $23.08 to Lenore, daughter, born 11/26/09.

$1.69 per week being 7 1-3% of $23.08 to Lillian, daughter, born 3/30/12.

The employer and insurance carrier is hereby directed in accordance with the provisions of the Workmen's Compensation Law, to pay the above award in the following manner:

To Lillian E. Stewart, 1829 Amsterdam Ave., N. Y. C., $100 for funeral expenses.

To Lillian E. Stewart, 1829 Amsterdam Ave., N. Y. C., in sums as follows: $76.90 at once for period from 8/3/18 (date of death to 9/7/18, and thereafter $30.76 bi-weekly instalments periodically in accordance with the method of payment of wages of the employees at the time of injury or death.

The above copy of the decision and award is sent to you pursuant to sections 20 and 28 of the Compensation Law.

Yours truly,

STATE INDUSTRIAL COMMISSION,
JOHN MITCHELL,
Chairman.

(NOTE.—Correspondence should be addressed to the New York Office.)

To the Claimant: Call at the office of the insurance carrier given above to collect the first instalments of award due at which time arrangements may be made to receive compensation payments by mail or otherwise.

Compensation in death cases is based on weekly wages obtained as follows: Multiply the daily wage by 300 and divide by 52.

Section 16.—Death benefits.—If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses, not exceeding one hundred dollars.

2. If there be a surviving wife (or dependent husband), and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood), with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband), any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the commission the appointment of a guardian for such purposes shall not be necessary. (Subd. 2 am'd by L. 1914, ch. 316; and L. 1916, ch. 622.)

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband), then for the support of each such child until the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years, or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate
41 amount payable under this subdivision exceed the difference between sixty-six and two thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband), or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident. (Subd. 4, am'd by L. 1916, ch. 622.)

Corrected Notice of Award in Death Cases.

State Industrial Commission.

Principal Office: The Capitol, Albany, N. Y.

New York Office: 230 Fifth Avenue.

G. O. R.

Case No. 350055 N. Y.

Date, Sept. 28, 1918.

William M. Stewart, Deceased.

To Knickerbocker Ice Co., Employer, 1480 Broadway, N. Y. C., and Mrs. Lillian E. Stewart, Claimant, 1829 Amsterdam Avenue, N. Y. C., and Self Insurance Carrier.

Corrected Notice.

This is notice that at a meeting of the State Industrial Commission held 9/18/18, a decision and award of compensation was
42 made in the above case as follows:

$6.93 per week being 30% of $23.08 (average w'kly wages) to be paid to widow, born 2/1/78 during period of widowhood.
$1.69 per week being 7 1/3% of $23.08 to Beatrix, daughter, born 2/11/04.

$1.69 per week being 7 1/3% of $23.08 to Alida, daughter, born 8/3/05.
$1.69 per week being 7 1/3% of $23.08 to William M., son, born 1/14/08.
$1.69 per week being 7 1/3% of $23.08 to Lenore, daughter, born 11/26/09.
$1.69 per week being 7 1/3% of $23.08 to Lillian, daughter, born 3/30/12.

The employer and insurance carrier is hereby directed in accordance with the provisions of the Workmen's Compensation Law, to pay the above award in the following manner:

To Lillian E. Stewart, 1829 Amsterdam Ave., N. Y. C., $95.50 for funeral expenses.

To Lillian E. Stewart, 1829 Amsterdam Ave., N. Y. C., in sums as follows: $76.90 at once for period from 8/3/18 (date of death) to 9/7/18, and thereafter $30.76 bi-weekly instalments periodically in accordance with the method of payment of wages of the employees at the time of injury or death.

The above copy of the decision and award is sent to you pursuant to sections 20 and 23 of the Compensation Law.

Yours truly,

STATE INDUSTRIAL COMMISSION,
JOHN MITCHELL,
Chairman.

43 (NOTE.—Correspondence should be addressed to the New York office.)

To the claimant: Call at the office of the insurance carrier given above to collect the first instalment of award due at which time arrangements may be made to receive compensation payments by mail or otherwise.

Compensation in death cases is based on weekly wages obtained as follows: Multiply the daily wage by 300 and divide by 52.

Section 16.—Death benefits.—If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses, not exceeding one hundred dollars.

2. If there be a surviving wife (or dependent husband), and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood), with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each child until the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband), any surviving child of the deceased employee, at the time under eighteen years of

age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the commission the appointment of a guardian for such purposes shall not be necessary. (Subd. 2 am'd by L. 1914, ch. 316; and L. 1916, ch. 622.)

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband), then for the support of each such child until the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years, or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than six-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband), or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident. (Subd. 4, am'd by L. 1916, ch. 622.)

Conclusion of Fact, Ruling of Law and Award.

State Industrial Commission.

Death Case No. 350,055.

In the Matter of the Claim for Compensation under the Workmen's Compensation Law Made by LILLIAN E. STEWART, Widow of William M. Stewart, Deceased, on Behalf of Herself and Infant Children, on Account of the Death of William M. Stewart

against

KNICKERBOCKER ICE COMPANY, Employer and Self Insurer.

This claim came on for hearing before State Industrial Com-
46 mission at its office, No. 230 Fifth Avenue, New York City, on September 18, 1918, and an award of compensation was made as hereinafter set forth. At said hearing, the attorney for the employer and self-insurer raised the question of the constitutionality of the Amendment by Congress of Sections 24 and 256, of the Judicial Code, contending that said amendment was in violation of the Constitution of the United States, and made in excess of the powers of Congress under the powers of the Constitution.

Appearances:

Robert W. Bonynge, Esq., Counsel to State Industrial Commission.
Bertrand L. Pettigrew, Esq., Attorney for Claimant.
Frank R. Savidge, Esq., (Cleland R. Neal, Esq., of Counsel), Attorney for Employer and Self-Insurer.

All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its Conclusions of Fact, Ruling of Law and Award, as follows:

Conclusions of Fact.

1. On August 3, 1918, the day when William M. Stewart received the injuries which resulted in his death, he resided at No. 1829 Amsterdam Avenue, New York City and was employed by Knickerbocker Ice Company, a New Jersey Corporation, engaged in the business of ice storage and ice distribution, as well as in the operation of barges on the Hudson River for the purpose of distributing
47 ice from ice houses on the upper Hudson within the State of New York to points in New York City. William M. Stewart was employed as a barge man on one of said barges.

2. On August 3, 1918, William M. Stewart was working for his employer and while engaged in the regular course of his employment as a barge man, and while standing on a dock or pier at the corner of 95th Street and North River, New York City, participating in the dismantling of a derrick and rigging which had been used to remove

ice from the barge, he lost his balance and fell backward into the river and was drowned.

3. The injuries which resulted in the death of William M. Stewart were accidental injuries, and arose out of and in the course of his employment.

4. The average weekly wage of William M. Stewart was the sum of $23.08.

5. Due notice of death was given to the employer.

6. William M. Stewart left him surviving Lillian E. Stewart, widow, aged 40 years; Beatrix Stewart, daughter, aged 14 years; Alida Stewart, daughter, aged 13 years; William M. Stewart, son, aged 10 years; Lenore Stewart, daughter, aged 9 years, and Lillian Stewart, daughter, aged 6 years, the claimants herein.

Ruling of Law.

This claim comes within the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916, 1917 and 1918, known as the Workmen's Compensation Law.

Award.

48 Award of compensation is hereby made against Knickerbocker Ice Company, Employer and Self-Insurer, to the widow and minor children of William M. Stewart, deceased employee, as follows: to Lillian E. Stewart, widow, aged 40 years, at the rate of $6.93 weekly during widowhood, with two years' compensation in one sum upon re-marriage; to Beatrix Stewart, daughter, aged 14 years; to Alida Stewart, daughter, aged 13 years; to William M. Stewart, son, aged 10 years; to Lenore Stewart, daughter, aged 9 years; and to Lillian Stewart, aged 6 years, at the rate of $1.69 weekly to each until they shall respectively arrive at the age of 8 years; and in case of the subsequent death of Lillian E. Stewart, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15 per cent. of the above mentioned average weekly wage, but in no event shall the total amount payable exceed 66 2-3 per centum of such wages; and if the payment to the widow shall otherwise cease, or if the payments to any child by operation of law or otherwise, then the payments to each of the remaining children shall be increased to 10 per cent. of the said average weekly wage; and to Lillian E. Stewart in the sum of $95.50 on account of the funeral expenses of William M. Stewart, deceased.

Dated, September 18, 1918.

STATE INDUSTRIAL COMMISSION.
JAMES M. LYNCH,
EDW. P. LYON,
HENRY D. SAYER,
Commissioners.

49 *Certification of Record.*

I, William S. Coffey, Secretary of the State Industrial Commission, do hereby certify that I have compared the foregoing papers (except the Statement Under Rule 41) with the respective originals thereof on file in the office of the State Industrial Commission, and that the same are true and correct copies of said originals, and of the whole thereof, and that said papers constitute all of the papers and proceedings herein, including the evidence, which were before said State Industrial Commission in relation to the foregoing claim.

In Witness whereof, I hereunto set my hand and the official seal of the State Industrial Commission on the 18th day of November, 1918.

[SEAL.] W. S. COFFEY,
Secretary State Industrial Commission.

50 *Order of Chairman to File With the Appellate Division.*

Upon the foregoing certification of this record, it is

Ordered, that the foregoing printed record is hereby settled, as and for the record on appeal herein, and is hereby ordered filed in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

Dated, New York, N. Y., Nov. 18, 1918.

HENRY D. SAYER,
State Industrial Commissioner.

51 *Order of Affirmance of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court in and for the Third Department, Held at the Court House in the City of Albany, N. Y., Commencing on the 7th Day of January, 1919.

Present: Hon. John M. Kellogg, President Justice;
" George F. Lyon,
" John Woodward,
" A. V. S. Cochrane,
" Henry T. Kellog, Associate Justices.

In the Matter of the Claim of LILLIAN E. STEWART for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law,

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

The above named Knickerbocker Ice Company having appealed from the award of the State Industrial Commission entered in the

office of said Commission on the 18th day of September, 1918,
52 whereby compensation was awarded to the widow and minor children of William M. Stewart, deceased employee, as follows: to Lillian E. Stewart, widow, aged 40 years, at the rate of $6.93 weekly during widowhood, with two years' compensation in one sum upon re-marriage; to Beatrix Stewart, daughter, aged 14 years; to Alida Stewart, daughter, aged 13 years; to William M. Stewart, son, aged 10 years; to Lenore Stewart, daughter, aged 9 years, and to Lillian Stewart, aged 6 years, at the rate of $1.69 weekly each until they shall respectively arrive at the age of 18 years; and in case of the subsequent death of Lillian E. Stewart, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15 per cent. of the above mentioned average weekly wage, but in no event shall the total amount payable exceed 66 2-3 per centum of such wages; and if the payments to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased 10 per cent. of the said average weekly wage; and to Lillian E. Stewart in the sum of $95.50 on account of the funeral expenses of William M. Stewart, deceased; and said appeal having come on to be heard in this court, and having been argued by Frank R. Savidge, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and due deliberation having been had thereon;

Now, on motion of Charles D. Newton, Attorney General, attorney for the State Industrial Commission, it is

53 Ordered, that the award of the State Industrial Commission appealed from be and the same hereby is unanimously affirmed.

A Copy,
[SEAL.] JOSEPH H. HOLLANDS,
Clerk.

Order of Affirmance of State Industrial Commission.

Before the State Industrial Commission.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law,

against

KNICKERBOCKER ICE COMPANY, Employer and Self Insurer.

The above named Knickerbocker Ice Company, employer and self insurer having appealed to the Appellate Division of the Su-
54 preme Court in and for the Third Judicial Department, from the award and decision of the State Industrial Commission, made and entered herein on the 18th day of September, 1918, whereby compensation was awarded the above named Lillian E. Stewart, widow, aged 40 years, at the rate of $6.93 weekly during

widowhood, with two years' compensation in one sum upon remarriage, to Beatrix, daughter, aged 14 years; to Alida, daughter, aged 13 years; to William M., son, aged 10 years, to Lenore Stewart, daughter, aged 9 years, and to Lillian, daughter, aged 6 years, at the rate of $1.69 weekly each until they shall respectively arrive at the age of 18 years; and in case of the subsequent death of Lillian E. Stewart, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15% of the above mentioned average weekly wage, but in no event shall the total amount payable exceed 66 2-3% of such wages; and if the payments to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased 1% of the said average weekly wage; and to Lillian E. Stewart in the sum of $95.50 on account of the funeral expenses of William M. Stewart, deceased; and said appeal having been duly heard by said court, and the Appellate Division of the Supreme Court having at a term thereof commencing on the 7th day of January, 1919, unanimously affirmed the award and decision heretofore made by the State Industrial Commission, and the papers on appeal herein together with a certified copy of said order of the Appellate Division having been duly filed; it is

Ordered, that the order of the Appellate Division be and the same hereby is made the order of the State Industrial Commission,
55 and the award heretofore made herein be and the same hereby is affirmed with interest from September 18, 1918.

Dated, New York, January 31st, 1919.

W. S. COFFEY,
Secretary.

Notice of Appeal to the Court of Appeals.

The State Industrial Commission.

Case No. 350,055.

Before State Industrial Commission, Respondent.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law, Claimant-Respondent,

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

Notice of Appeal to the Court of Appeals.

Please take notice, that pursuant to Section 190, subdivision 1, of the Code of Civil Procedure of the State of New York, the
56 above-named Knickerbocker Ice Company, Employer, hereby appeals to the Court of Appeals of the State of New York, from the order entered in the above-entitled matter in the office of

the Clerk of the Appellate Division, Third Judicial Department, on the 21st day of January, 1919, affirming the award of the Workmen's Compensation Commission of September 18th, 1918, in favor of the claimant-respondent and against the employer-appellant, and also from the order of the State Industrial Commission, dated January 31st, 1919, affirming said award and making the above-mentioned order of the Appellate Division the order of the State Industrial Commission, and the appellant appeals from each and every part and provision of each of said orders.

Dated, New York, March 14, 1919.

Yours, etc.,

FRANK R. SAVIDGE,
Attorney for Appellant, Knickerbocker Ice Company,
45 Cedar Street, Borough of Manhattan, New York, N. Y.

57 To—

Hon. Charles D. Newton, Attorney General of the State of New York, Albany, N. Y.

State Industrial Commission, Albany, N. Y., and No. 230 Fifth Avenue, New York City, N. Y.

Robert W. Bonynge, Esq., Counsel for State Industrial Commission, No. 230 Fifth Avenue, New York City, N. Y.

Mrs. Lillian E. Stewart, Claimant, No. 1829 Amsterdam Avenue, New York City, N. Y.

Joseph H. Hollands, Esq., Clerk of the Appellate Division, Third Judicial Department, Albany, N. Y.

58 *Affidavit of No Opinion.*

Court of Appeals of the State of New York.

Before Industrial Commission, Respondent.

Case No. 350,055.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law, Claimant-Respondent.

against

KNICKERBOCKER ICE COMPANY, Employer-Appellant.

STATE OF NEW YORK,
City and County of New York, ss:

Cleland R. Neal, being duly sworn, says that he is an attorney in the office of Frank R. Savidge, the attorney for the appellant herein.

That no opinion was delivered or written by the Appellate Di-
59 vision, Third Judicial Department, upon the decision of the appeal from the award of the State Industrial Commission herein.

CLELAND R. NEAL.

Sworn to before me this 25th day of March, 1919.
SIMON SVERDLIK,
Commissioner of Deeds, N. Y. City.

Term expires November 27, 1919.
County Clerk's Nos. New York 515.
Bronx 62, Kings 308A, Queens 3555,
Register's Nos. New York 19195.
Bronx 9065, Kings 9133.

60 *Stipulation and Waiver of Certification.*

It is hereby stipulated that the foregoing are true copies of the original notice of appeal, papers, records, evidence and proceedings of every nature on file in the office of the State Industrial Commission (formerly the State Workmen's Compensation Commission), as settled in the above entitled matter, together with the order of affirmance of the Appellate Division, the order of affirmance of the State Industrial Commission, and the notice of appeal to the Court of Appeals; certification thereof by the Clerk is hereby expressly waived.
Dated, New York, March 26, 1919.

CHARLES D. NEWTON,
Attorney General of the State of New York.

ROBERT W. BONYNGE,
Counsel for State Industrial Commission.

FRANK R. SAVIDGE,
Attorney for Knickerbocker Ice Company, Employer-Appellant.

61 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th Day of April, in the Year of our Lord one thousand nine hundred and nineteen, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER,
Clerk.

Remittitur April 30, 1919.

62 In the Matter of the Claim of LILLIAN E. STEWART for Compensation, &c.

Be it Remembered, That on the 3rd day of April in the year of our Lord one thousand nine hundred and nineteen Knickerbocker Ice Company the appellant in this cause, came here into the Court of Appeals, by Frank R. Savidge its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And State Industrial Commission the respondent in said cause, afterwards appeared in said Court of Appeals by Charles D. Newton, Attorney General, attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

63 Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frank R. Savidge of counsel for the appellant, and by Mr. E. C. Aiken of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, April 30, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. BARBER,
Clerk.

64 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of Claim of Lillian E. Stewart, Respondent, v. Knickerbocker Ice Company, Appellant (State Industrial Commission, Respondent), decided by the Court of Appeals on the 29th day of April, 1919, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 17 day of July, 1919.

[Seal Court of Appeals, State of New York.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of Claim of Lillian E. Stewart, Respondent, v. Knickerbocker Ice Company, Appellant (State Industrial Commission, Respondent), decided by the said Court of Appeals on the 29th day of April, 1919, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 28 day of July, in the year one thousand nine hundred and nineteen.

FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals of the State of New York.

65 In the Matter of the Claim of LILLIAN E. STEWART, Respondent,

v.

KNICKERBOCKER ICE COMPANY, Appellant.

State Industrial Commission, Respondent.

(Decided April 29, 1919.)

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department entered January 21, 1919, affirming an award of the state industrial commission, made under the Workmen's Compensation Law.

Frank R. Savidge for appellant.
Charles D. Newton, Attorney General (E. C. Aiken of counsel) for respondent.

HISCOCK, *Ch. J.:*

This is an appeal from an affirmance of an award made under the Workmen's Compensation Act for injuries received by one Stewart while engaged in helping to unrig a derrick on one of the defendant's barges. It is conceded that the work in which the injured man was engaged was of a maritime nature and upon that conceded fact the argument is made that our Workmen's Compensation Act is not applicable because it is in conflict with the Constitution of the United States and with the Federal statute passed thereunder. The attempt is made to support this argument almost exclusively by reference to the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen (244 U. S. 205.)

The Jensen case was one involving the applicability of our Workmen's Compensation Act to injuries received by a stevedore while engaged in helping to unload a vessel belonging to the Southern Pacific Railroad Company. The two questions which were considered by Judge Miller in his opinion (215 N. Y. 514) were the ones whether our act was unconstitutional as depriving employers of property without due process of law, and second, whether it was in conflict with the Federal Constitution because attempting directly to regulate or impose a tax or burden on interstate or foreign commerce, the Southern Pacific Company, owner of the vessel, being concededly engaged in such commerce. He reached the conclusion,

concurred in by all members of the court voting, that the act was not vulnerable in either of those respects. When the case reached the Supreme Court, however, a new question was argued and it was held by a closely divided vote that inasmuch as the injured man was engaged in maritime work, our Compensation Act was violative of the United States Constitution as embodied in the Federal statutes adopted thereunder conferring jurisdiction in such a case upon the Federal courts.

66 In the prevailing opinion it was, amongst other things, in substance, written that the Constitution extended the judicial power of the United States "To all cases of admiralty and maritime jurisdiction" and conferred upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof;" (p. 214) that under these provisions of section 9 of the Judiciary Act of 1789 the District Courts of the United States had been given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it;" (p. 215) and that this grant had been continued under the Judicial Code, sections 24 and 256; that the remedy given by our compensation statute was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and therefore not saved to suitors from the grant of exclusive jurisdiction under the foregoing statute. Proceeding upon these fundamental principles it was held that our act was in conflict with the Constitution as expressed in these statutes.

It was, however, recognized in the prevailing opinion that the general maritime law under which jurisdiction was reserved to the Federal courts might be changed, modified or affected by state legislation and that it was impossible to define with exactness just how far this might be done. The limitation which was placed upon this power was defined in the general proposition that "no such legislation (by the State affecting maritime jurisdiction) is valid if it contravenes the essential purpose expressed by an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." (p. 216.)

The enactment by the states of Workmen's Compensation Acts has become very general. Public sentiment has justified and demanded the enactment of these statutes as offering speedy and simple relief to injured workmen and their dependents and as being a positive and decided step in the interest of industrial welfare and of better relations between employers and employees. In recognition of this widespread public sentiment and realizing it is desirable that the states should be given power to enact and administer such statutes as these, the Congress, since the decision of the Jensen case, has very materially modified the Federal statute under which it was

held that our decision in the latter case could not stand. It has amended this statute so that it now saves from the jurisdic-
67 tion of the Federal courts "to suitors in all cases the right of a common-law remedy when the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state."

In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the Jensen case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the Federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the Constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional.

The order should be affirmed, with costs.

Chase, Hogan, Cardozo, Pound, McLaughlin and Andrews, JJ., concur.

Order affirmed.

[Endorsed:] Matter of Stewart. Hiscock, Ch. J.

[Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, vs. Lillian E. Stewart, Defendant-in-Error. Copy. Certified Copy Opinion of New York Court of Appeals. Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

68 At a Term of the Appellate Division of the Supreme Court, Held in and for the Third Department, at the Court House, in the City of Albany, N. Y., Commencing on the 6th Day of May, 1919.

Present:

Hon. John M. Kellogg, Presiding Justice.
Hon. George F. Lyon,
Hon. John Woodward,
Hon. A. V. S. Cochrane,
Hon. Henry T. Kellogg, Associate Justices.

In the Matter of the Claim of LILLIAN E. STEWART, for Compensation for Herself and Children for the Death of William M. Stewart, under the Workmen's Compensation Law,

against

KNICKERBOCKER ICE COMPANY, Employer, Appellant.

The above named Knickerbocker Ice Company having appealed from the order of the Appellate Division of the Supreme Court, in and for the Third Department, made at a term commencing on the 7th day of January, 1919, which affirmed an award of the State Industrial Commission entered in the office of said Commission on the 18th day of September, 1918, whereby compensation was awarded to the widow and minor children of William M. Stewart, deceased employee, as follows: to Lilliam E. Stewart, widow, aged 40 years, at the rate of $6.93 weekly during the widowhood, with two years' compensation in one sum upon remarriage; to Beatrix Stewart, daughter, aged 14 years; to Alida Stewart, daughter, aged 13 years; to William M. Stewart, son, aged 10
69 years; to Lenore Stewart, daughter, aged 9 years, and to Lillian Stewart, aged 6 years, at the rate of $1.69 weekly each until they shall respectively arrive at the age of 18 years; and in case of the subsequent death of Lillian E. Stewart, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15 per cent. of the above mentioned average weekly wage, but in no event shall the total amount payable exceed 66 2/3 per centum of such wages; and if the payments to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased 10 per cent. of the said average weekly wage; and to Lillian E. Stewart in the sum of $95.50 on account of the funeral expenses of William M. Stewart, deceased; and said appeal having been argued in the Court of Appeals by Frank R. Savidge, Esq., of counsel for the appellant, and E. C. Aiken, Deputy Attorney General, for the State Industrial Commission, and the Court of Appeals, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs; and further ordered that the record and proceedings be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law; and the said remittitur having been filed in this court,

Now, on motion of Charles N. Newton, Attorney General, attorney for the State Industrial Commission, it is
70 Ordered, that the order and judgment of the Court of Appeals be and the same is hereby made the order of this Court, and that the award or decision of the State Industrial Commission entered on the 18th day of September, 1918, be and the same is

hereby in all respects affirmed with $116.50 costs to be paid by the appellant.

[Seal of Supreme Court, Appellate Division.]

JOSEPH H. HOLLANDS,
Clerk.

71 [Endorsed:] New York Supreme Court, Appellant Division Third Department. In the Matter of the Claim of Lillian E. Stewart, for compensation, etc., vs. Knickerbocker Ice Company. Order Affirming Order. Charles D. Newton, Attorney General, Attorney for St. Ind. Com. Capitol, Albany, N. Y.

New York Court of Appeals.

72 KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error.

against

LILLIAN E. STEWART, Defendant-in-Error.

Application for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Judge of the New York Court of Appeals:

The petition of Knickerbocker Ice Company respectfully shows:

On August 10th, 1918, Lillian E. Stewart filed a claim with the New York State Industrial Commission for compensation, under the Workmen's Compensation Law, for the death of her husband, William M. Stewart, which occurred on August 3rd, 1918, while in the employ of the Knickerbocker Ice Company, a New Jersey corporation. Said Stewart at the time of the accident, which resulted in his death, was engaged in the regular course of his employment as a bargeman on a vessel belonging to your petitioner, and while standing on a dock or pier at the corner of 95th Street and North River, New York City, participating in the dismantling of a derrick and rigging which had been used to unload ice from his barge, lost his balance and fell back into the river and was drowned. The injury was accidental. The employe just prior to dismantling the derrick, had been engaged in the hold of the barge, hooking ice to the tongs, which were raised to the dock by the derrick which he was dismantling when killed.

73 Your petitioner's business in this State consists of ice storage and ice distribution, as well as in the operation of barges for the purpose of distributing ice from ice houses on the upper Hudson within the State of New York to points in New York City.

Your petitioner objected to the making of an award on various grounds set out in the record and set out in the assignments of error made in connection with this application for a writ of error. The Commission, however, on September 28th, 1918, made an award

of compensation claiming to act under the Workmen's Compensation Law of the State of New York, under the provisions of Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as reenacted and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916, 1917 and 1918.

From said award your petitioner appealed to the Appellate Division of the Supreme Court, Third Judicial Department, and said Appellate Division affirmed said award. Thereupon your petitioner appealed from said order to the New York Court of Appeals, which is the highest court in the State of New York, and said Court of Appeals adjudged that said order of said Appellate Division should be affirmed, and it remitted the record with its said judgment to the said Appellate Division, which thereupon made said judgment of the Court of Appeals the judgment of said Appellate Division. Said record is now with said Appellate Division.

Inasmuch as certain errors appear in the judgment en-
74 tered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, your petitioner prays for the allowance of a writ of error returnable to the Supreme Court of the United States, and a citation.

And so it will ever pray, etc.

Dated, July 15, 1919.

KNICKERBOCKER ICE COMPANY,
By FRANK R. SAVIDGE,
Its Attorney.

75 [Endorsed:] New York Court of Appeals. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Application for Writ of Error, (orig). Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City. Read on application for writ of error, July 17, 1919. F. H. H., Ch'f Judge Court of Appeals.

76 Supreme Court of the United States.

KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error,

against

LILLIAN E. STEWART, Defendant-in-Error.

Assignments of Error by Plaintiff-in-Error.

And now comes Knickerbocker Ice Company, plaintiff-in-error in the above entitled matter, and in connection with its application for a writ of error makes its assignments of error:

1. The Court erred in deciding that the Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916, 1917 and 1918, was not unconstitutional, in that it constitutes a regulation and a burden upon

commerce among the several states in violation of Article 1, Sec. 8, of the Constitution of the United States, whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution and statutes.

2. The Court erred in deciding that the Workmen's Compensation Law, L. 1913, ch. 816, as reenacted by L. 1914, ch. 41, and amended by Chapter 316 of the Laws of 1914, and as further amended by the Laws of 1915, 1916, 1917 and 1918, was not unconstitutional in that it violates Article 3, Sec. 2, of the Constitution of the United States conferring admiralty jurisdiction upon the courts of the United States, whereby was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was against their validity; and therein was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution of laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity especially set up or claimed under such Constitution or statutes.

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3. The Court erred in deciding that Section 24 of Chapter 2 and Section 256 of Chapter 11, of the Judicial Code of the United States, as amended by Chapter 97 of the United States Statutes of 1917, in so far as rights and remedies under workmen's compensation acts of the several states are thereby saved to claimants, were not invalid and unconstitutional in that they violate Article 3, Section 2 of the Constitution of the United States conferring admiralty jurisdiction upon the courts of the United States, wherein was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was in favor of their validity; and therein was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity specially set up or claimed under such Constitution or statutes.

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4. The Court erred in deciding that Section 24 of Chapter 2 and Section 256 of Chapter 11, of the Judicial Code of the United States, as amended by Chapter 97 of the United States Statutes in 1917, in so far as rights and remedies under workmen's compensation acts

of the several states are thereby saved to claimants, were not invalid and unconstitutional in that they constitute a regulation and a burden upon commerce among the several states in violation of Article 1, Section 8, of the Constitution of the United States, wherein was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was in favor of their validity; and therein was drawn in question the validity of a statute of or an authority exercised under the State of New York, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege or immunity
79 especially set up or claimed under such Constitution or statutes.

5. The Court erred in not rendering judgment in favor of the plaintiff in error, because said Workmen's Compensation Law, Laws of 1913, Chapter 816, as reenacted by the laws of 1914, Chapter 41, and is further amended by the Laws of 1915, 1916, 1917 and 1918, as applied to this plaintiff in error, is unconstitutional and void and in conflict with and in violation of Article 1, Section 8, Article 3, Section 2, of the Constitution of the United States, and because Section 24 of Chapter 2 and Section 256 of Chapter 11, of the Judicial Code of the United States, as amended by Chapter 97 of the United States Statutes of 1917, in so far as rights and remedies under workmen's compensation acts of the several states are thereby saved to claimants, as applied to this plaintiff in error, were invalid and unconstitutional in that they violate Article 3, Section 2 of the Constitution conferring admiralty jurisdiction upon the courts of the United States, and constitute a regulation and a burden upon commerce in violation of Article 1, Section 8 of the Constitution of the United States, wherein was drawn in question the validity of a statute of or an authority exercised under the United States and the decision was in favor of their validity; and whereby was drawn in question the validity of a statute of or an authority exercised under the State of New York on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity; and therein a right, privilege or immunity was claimed by the plaintiff in error under the Constitution or statutes of the United States and the decision was against the right, privilege
80 or immunity especially set up or claimed under such Constitution or statutes.

Dated, New York, July 15, 1919.

FRANK R. SAVIDGE,
Attorney for Knickerbocker Ice Company.

81 [Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Assignments of Error. (Orig.) Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City. Read on Application for Writ of Error, July 17, 1919. F. H. H. Ch'f Judge, Court of Appeals.

82 New York Court of Appeals.

KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error,

against

LILLIAN E. STEWART, Defendant-in-Error.

Order Allowing Writ of Error.

On reading of the petition of Knickerbocker Ice Company for writ of error and the assignments of error, and upon due consideration of the record of said cause:

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of the State of New York as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff-in-error Knickerbocker Ice Company give security in the sum of two thousand five hundred ($2,500) dollars, that the said plaintiff-in-error shall prosecute said writ of error to effect and, if said plaintiff-in-error fail to make its plea good, shall answer to the defendant-in-error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff-in-error now presenting a bond in the sum of two thousand five hundred ($2,500) dollars with the United States Fidelity and Guaranty Company as surety,

It is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 17 day of July, 1919.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

83 [Endorsed:] New York Court of Appeals. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Order Allowing Writ of Error (orig.) Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Appellate Division, Third Department, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court. Appellate Division, on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which decision could be had in the suit

between Lillian E. Stewart, plaintiff, and Knickerbocker Ice Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such clause of the said Constitution, statute, treaty or commission; a manifest error *had* happened to the great damage of the said defendant, as is said and appears by its complaint. We being willing that error, if any hath been, should be duly cor-
85 rected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States this 17 day of July in the year of our Lord one thousand nine hundred and nineteen.

[Seal of District Court of the United States, Southern District, N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court, Southern District of New York.

The above writ is allowed by
FRANK H. HISCOCK,
Chief Judge of the New York Court of Appeals.

[Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Writ of Error. Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

86 UNITED STATES OF AMERICA, ss:

To Lillian E. Stewart and the State Industrial Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, Appellate Division, Third Department, wherein Knickerbocker Ice Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, Hon. Frank H. Hiscock, Chief Judge of the New York Court of Appeals, this 17 day of July, in the year of our Lord one thousand nine hundred and nineteen.

FRANK H. HISCOCK,
Chief Judge of the New York Court of Appeals.

87 [Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Citation. (Orig.) Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

88 Supreme Court of the United States.

KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error,

against

LILLIAN E. STEWART, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

Now comes the above named plaintiff-in-error, and in connection with its writ of error issued by this Court to the Appellate Division of the Supreme Court of the State of New York, Third Department, it prays for a reversal of the judgment against it of said Appellate Division affirming an award of the State Industrial Commission, entered in the office of said Court, on January 7th, 1919, and it also prays for a reversal of the judgment of affirmance entered in the office of said Court on May 12th, 1919, upon the order or judgment of the Court of Appeals, and for a reversal of the judgment of the Court of Appeals affirming said judgment or orders.

FRANK R. SAVIDGE,
Attorney for Knickerbocker Ice Company,
Plaintiff-in-Error.

89 [Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, against Lillian E. Stewart, Defendant-in-Error. Prayer for Reversal. (Orig.) Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

90 New York Court of Appeals.

72 KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error,

against

LILLIAN E. STEWART, Defendant-in-Error.

Bond for Damages and Costs.

Know all men by these presents:

That we, Knickerbocker Ice Company, of — as Principal and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as Surety are held and firmly bound unto the above named Lillian E. Stewart in the sum of two thousand five hundred ($2,500.00) dollars, to be paid to the said Lillian E. Stewart, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, successors, and assigns, jointly and severally, firmly by these presents.

Sealed, with our Seals and dated this 10th day of July, 1919.

Whereas, the above named Plaintiff-in-error Knickerbocker Ice Company has sued out a writ of error from the United States Supreme Court to the Court of Appeals from the State of New York, to reverse the judgment of said Court of Appeals, rendered on the 29th day of April, 1919, in the suit of Lillian E. Stewart, Plaintiff-Respondent against Knickerbocker Ice Company, Defendant-Appellant and entered in the Appellate Division of the Supreme Court, Third Department of said State, on the 12th day of May, 1919.

Now therefore, the Condition of This Obligation is Such,

91 that if the above named Knickerbocker Ice Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed, Sealed and Delivered in the presence of,

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-fact.

Attest:—

WILLIAM H. ESTWICK,
Attorney-in-fact.

92 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be — of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Knickerbocker Ice Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Knickerbocker Ice Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[Seal United States Fidelity & Guaranty Company, Incorporated 1895.]

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 10th day of July, 1919.

AUGUSTUS WALLAUER,
Notary Public, New York County.

Notary Public, Queens County No. 1983.
Certificate filed in New York County No. 363 Register's No. 1370, Richmond, Westchester, Nassau, Putnam, Orange, Suffolk, & Rockland Counties. Term expires March 30, 1921.

93 [Endorsed:] Knickerbocker Ice Company, Principal, United States Fidelity & Guaranty Company, Surety, to Lillian E. Stewart. Bond for Damages and Costs. The within undertaking is approved as to form and as to the sufficiency of the

surety. —— ——, United States Fidelity and Guaranty Co., 47 Cedar Street, New York City, Surety.

94 Supreme Court of the United States.

KNICKERBOCKER ICE COMPANY, Plaintiff-in-Error,

against

LILLIAN E. STEWART, Defendant-in-Error.

Admission of Service.

Service is admitted of the following papers herein:

Application for Writ of Error.
Assignments of Error.
Order Allowing Writ of Error.
Writ of Error.
Citation.
Prayer for Reversal.
Bond for Damages and Costs.

Dated August 6th, 1919.

CHARLES D. NEWTON,
(E. C. A.,)
Attorney General, State of New York.

Dated August 20th, 1919.

BERNARD Z. SHMITAG,
Attorney for State Industrial Commission.

95 [Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, vs. Lillian E. Stewart, Defendant-in-Error. Admission of Service. Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

96 STATE OF NEW YORK,
County of Albany, ss:

I, Joseph H. Hollands, Clerk of the Supreme Court of the State of New York, Appellate Division, Third Department, pursuant to a writ of error directed to the Honorable the Judges of the said Appellate Division, Third Department, which said writ was allowed by the Honorable Frank H. Hiscock, Chief Judge of the New York Court of Appeals, and signed by the Clerk of the United States District Court for the Southern District of New York on July 17, 1919, do hereby certify the writing hereto annexed to be a true, complete and perfect copy of the record of assignments of error and of all proceedings in the case of Lillian E. Stewart, claimant-respondent, against Knickerbocker Ice Company, defendant-appellant, as fully as the same remain on file and of record in my office.

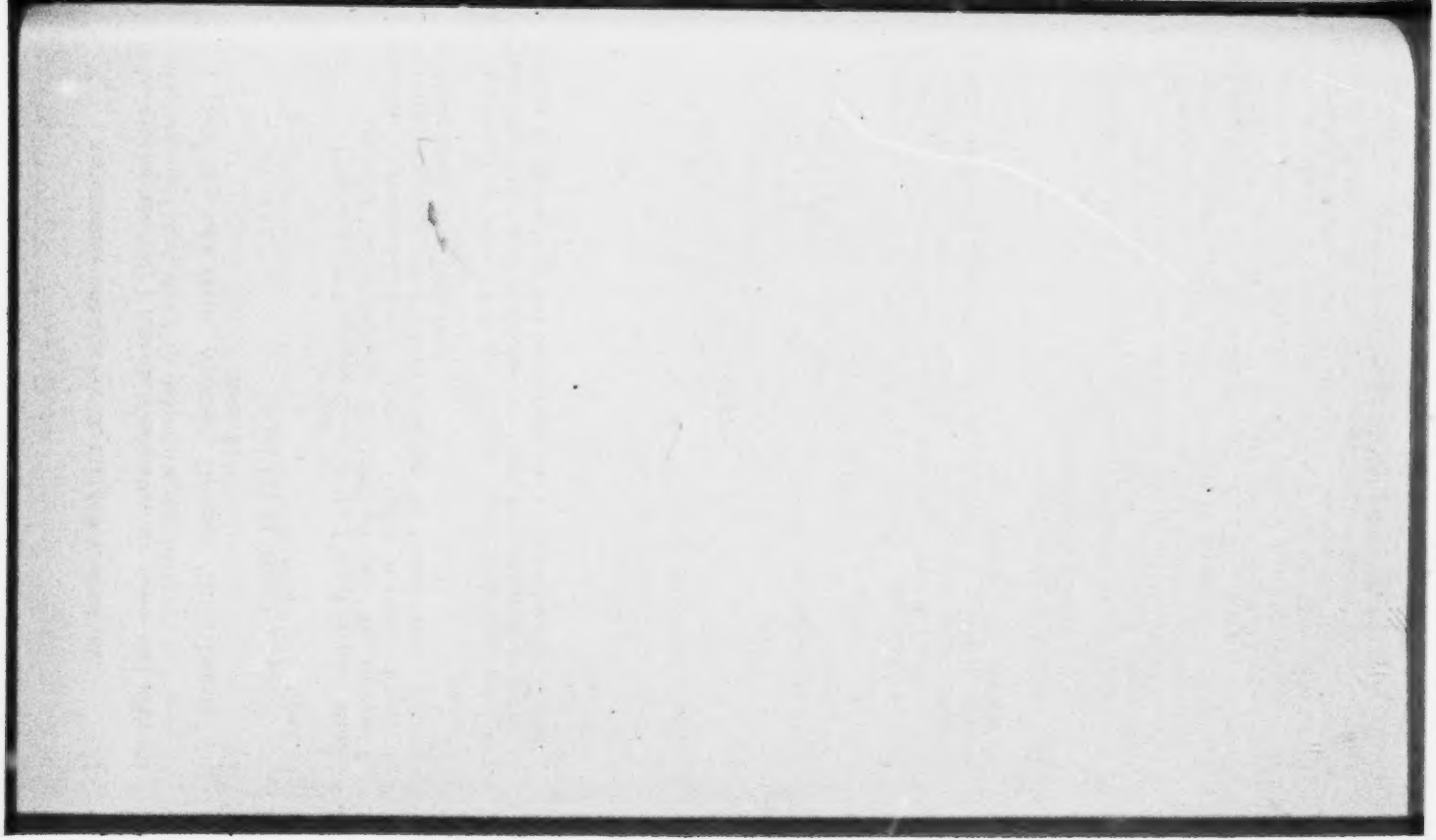
In witness whereof, I hereunto subscribe my name and affix the seal of the said Court, this 27th day of August, 1919.

[Seal Supreme Court, Appellate Division, Third Department.]

JOSEPH H. HOLLANDS,
Clerk.

97 [Endorsed:] Supreme Court of the United States. Knickerbocker Ice Company, Plaintiff-in-Error, vs. Lillian E. Stewart, Defendant-in-Error. Copy. Clerk's Return. Frank R. Savidge, Attorney for Plaintiff-in-Error, 45 Cedar Street, Borough of Manhattan, New York City.

Endorsed on cover: File No. 27,298. New York Supreme Court. Term No. 543. Knickerbocker Ice Company, plaintiff in error, vs. Lillian E. Stewart. Filed September 11, 1919. File No. 27,298.



Supreme Court, U. S.
FILED
SEP 11 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term 1919

No. 543

KNICKERBOCKER ICE COMPANY,
Plaintiff in error,

vs.

LILLIAN E. STEWART,
Defendant in error.

MOTION TO ADVANCE

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Deputy Attorney-General of Council for the State Industrial Commission.

FRANK R. SAVIDGE,
Attorney for Plaintiff in error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. ——

KNICKERBOCKER ICE COMPANY,
Plaintiff-in-Error,

against

LILLIAN E. STEWART,
Defendant-in-Error.

SIR:

Please take notice that a motion will be made at a session of this court appointed to be held on the 13th day of October, 1919, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance the hearing and argument of the appeal in the above cause, and for such other relief as may be proper.

Dated, Albany, N. Y., August 20, 1919.

CHARLES D. NEWTON,
Attorney-General,
Attorney for State Industrial Commission,
Capitol, Albany, N. Y.

E. C. AIKEN,
Deputy Attorney-General,
Of Counsel.

To

FRANK R. SAVIDGE, ESQ.,
Attorney for Plaintiff-in-Error,
45 *Cedar St., New York.*

KNICKERBOCKER ICE COMPANY,
Plaintiff-in-Error.

against

LILLIAN E. STEWART,
Defendant-in-Error.

Now comes the State Industrial Commission, representing the defendant-in-error, and moves this court to advance this cause on the docket of this court.

STATEMENT AND REASONS FOR ADVANCEMENT.

This cause is now pending in this court on writ of error allowed by Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals.

The State Industrial Commission of New York is charged under the statutes of the State of New York with the administration of the Workmen's Compensation Law in said State, and by the said law is made a party to all proceedings upon appeal in matters decided by it.

That in the above entitled matter, an award was made to Lillian E. Stewart, of compensation or benefits for the death of her husband, William M. Stewart, which occurred on August 3, 1918, while in the employ of the Knickerbocker Ice Company, a New Jersey corporation. Said Stewart, at the time of the accident which resulted in his death, was engaged in the regular course of his employment as a bargeman, on a vessel belonging to the plaintiff-in-error, and while standing on a dock or pier at the corner of 95th Street and North River, New York City, participating

in the dismantling of a derrick and rigging which had been used to unload ice from his barge, lost his balance and fell back into the river and was drowned.

The award was made by said State Industrial Commission to his widow under the provisions of the Workmen's Compensation Law of New York, which award was affirmed by the Appellate Division of the Supreme Court of said State of New York, and by the Court of Appeals.

That the plaintiff-in-error has challenged the said award on the ground that the said State Industrial Commission had no jurisdiction, and that the amendment to section 24 of chapter 2 and section 256 of chapter 11 of Judicial Code of United States, as amended by chapter 97 of the United States Statutes of 1917, in so far as rights and remedies under workmen's compensation acts of the several states are thereby saved to claimants, was invalid on the ground of its being repugnant to the Constitution of the United States.

The said Appellate Division of the Supreme Court of the State of New York, and the Court of Appeals of said State, hold that said law was valid and not repugnant to the Constitution or laws of the United States.

That in addition to the present case there are also pending other cases involving the same question, which cannot be decided until a hearing and decision by this court of this case, brought up by writ of error. There are also cases pending in Admiralty, and Mr. Justice Hand, in the United States District Court of New York, has held that the Workmen's Compensation Law, so far as it

applies to employes working on vessels within the territorial waters of said State, is exclusive remedy, and that there is no remedy in Admiralty which the said employes can invoke. That cases are constantly arising under the Workmen's Compensation Law where longshoremen or sailors working in New York harbor are injured, and it is important, therefore, that the law should be settled by this court at an early date, so that there may be a due administration of the Workmen's Compensation Law in the State of New York. That most of the claimants for compensation are men or women dependent upon their wages and of very limited means, and it is therefore very desirable to have an early decision.

CHARLES D. NEWTON,
Attorney-General.

E. C. AIKEN,
Of Counsel,
For the State Industrial Commission

KNICKERBOCKER ICE COMPANY,
Plaintiff-in-Error,

against

LILLIAN E. STEWART,
Defendant-in-Error.

Now comes the Knickerbocker Ice Company, plaintiff-in-error, represented by Frank R. Savidge, and on motion to advance this cause concurs with the counsel for the State Industrial Commission.

FRANK R. SAVIDGE,
Counsel for Plaintiff-in-Error.

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted] COMPANY,
Plaintiff in Error,

vs.

[redacted] STEWART,
Defendant in Error.

In Error to the Appellate Division, Third Department, of the Supreme Court of the State of New York.

Brief in Behalf of Plaintiff in Error.

Frank B. Sawtelle,
Attorney for Plaintiff in Error.

Lawyers' Brief Print. Co., 49 Wendell St., Phila.

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Argument:

Point 1. William M. Stewart, the husband of the defendant in error, was at the time of his death engaged in a maritime employment, under a maritime contract, upon navigable waters; the New York Workmen's Compensation Law, when applied to awards made for injuries to employes engaged in such employments is in contravention of the Constitution of the United States, as destructive of the uniformity in maritime law which the Constitution was designed to establish, and has been so held by the Court; the subsequent amendment of the Judicial Code of the United States by Congress, attempting to allow the states to extend their workmen's compensation laws to maritime employments, is likewise unconstitutional and for the same reasons; the uniformity of the maritime law is preserved by the Constitution, and no new remedies can be created in the maritime law except by act of Congress establishing a uniform law, to be administered by the United States Courts 11

Point 2. The New York Workmen's Compensation Law, as applied to maritime employments, is also unconstitutional in that an essential part of the Law bars rights of action in admiralty, which cannot be barred by legislation of the states 15

Cases cited:

Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52 ..... 11, 15
Matter of Anderson vs. Johnson Lighterage Co., 224 N. Y. 1 11
Butler vs. Boston & Savannah Steamship Co., 130 U. S. 527 14
Clyde S. S. Co. v. Walker, 244 U. S. 255 9
Matter of Doey vs. Howland, 224 N. Y. 30 11
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In re Garnett, 141 U. S. 1 14
Jensen v. Southern Pac. Co., 215 N. Y. 514 15
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The Lotawanna, 21 Wall 558 ..... 13, 16
The Max Morris, 137 U. S. 1 18
Matter of Post v. Burger, 216 N. Y. 544 9
The Roanoke, 189 U. S. 185 12
The Rosalie Mahoney, 218 Fed. 695 18
Southern Pacific Co. vs. Jensen, 244 U. S. 205 ..... 9, 11, 12
The Steam Lighter Howell (not reported) 19
The Transfer No. 12, 221 Fed. 409 16
Workman vs. New York City, 179 U. S. 552 17
Winfield vs. New York Central R. R. Co., 216 N. Y. 284 8

IN THE

Supreme Court of the United States.

December Term, 1919. No. 543.

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

v.

LILLIAN E. STEWART,
Defendant in Error.

I.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

This cause involves the constitutionality of the Workmen's Compensation Law of the State of New York and the validity of Sections 24 and 256 of the Judicial Code of the United States as amended in 1917, in so far as these sections confer jurisdiction on state authorities to enact Workmen's Compensation Laws effective over navigable waters of the United States and persons employed under maritime contracts.

II.

STATEMENT OF FACTS.

The defendant in error began this proceeding to obtain compensation for the death of her husband under the provisions of the New York Workmen's

Compensation Law, by the filing of a claim for compensation with the State Industrial Commission, a body established for the administration of that Law (P. 1). The Commission after hearing, made its findings, which are on pages 28 and 29 of the Record.

The facts found by the Commission are that the plaintiff in error is a corporation of the State of New Jersey, engaged in the business of ice storage and distribution, and the operation of barges on the Hudson River for the purpose of distributing ice from ice houses on the Upper Hudson River within the State of New York, to points in New York City, and that William M. Stewart, the husband of the defendant in error, was employed as a barge-man on one of said barges.

On August 3rd, 1918, the said William M. Stewart was engaged in the regular course of his employment, and while standing on a dock or pier at the corner of 95th Street and North (Hudson) River, New York City, participating in the dismantling of a derrick and rigging which had been used to unload ice from the barge, he lost his balance and fell backward into the river and was drowned.

At the hearing before the Commission the plaintiff in error urged that the Compensation Law as applied to this injury was in contravention of Article III, Section 2 of the Federal Constitution, it being a case of a maritime jurisdiction, and on the further ground that the amendments of Sections 24 and 256 of the Judicial Code of the United States in 1917, were unconstitutional and in excess of the powers of Congress under the Constitution. (P. 21.)

The Commission overruled these objections and awarded compensation of $6.93 per week to the widow during widowhood, with two years' compensation in

case of re-marriage, and compensation of $1.69 per week to each of two children until they should reach the age of eighteen; $95.50 on account of funeral expenses was also awarded.

Pursuant to Section 23 of the law, the employer appealed from the award or decision of the Commission to the Appellate Division of the Supreme Court, Third Department. The award was there affirmed without opinion. (Pages 30, 31.)

The employer then appealed to the Court of Appeals, where the order of the Appellate Division was affirmed and the record was remitted to the Appellate Division of the Supreme Court, Third Department. (Pages 34, 35.) Thereupon the employer sued out its writ of error in this Court.

The opinion of the Court of Appeals, written by Mr. Justice Hiscock, begins on Page 37 of the Record, and is reported in 226 N. Y. 302.

III.

SPECIFICATION OF ERRORS.

Plaintiff in error contends that the Court of Appeals erred in not deciding:

1. That the New York Workmen's Compensation Law is contrary to the Constitution of the United States, in that it constitutes a regulation of and burden upon interstate commerce.

2. That the New York Workmen's Compensation Law is unconstitutional in that it violates Article III, Section 2 of the Constitution of the United States conferring admiralty jurisdiction upon the Courts of the United States.

3. That Sections 24 and 256 of the Judicial Code of the United States, as amended by Chapter 97 of the United States statutes of 1917 are invalid and unconstitutional, in so far as rights and remedies under Workmen's Compensation Acts of the several states are thereby saved to claimants, in that they violate Article III, Section 2 of the Constitution of the United States conferring admiralty jurisdiction upon the Courts of the United States. (Assignments of Error, pages 42, 43, 44.)

IV.

BRIEF OF ARGUMENT.

1. William M. Stewart, the husband of the defendant in error, was at the time of his death engaged in a maritime employment, under a maritime contract, upon navigable waters; the New York Workmen's Compensation Law, when applied to awards made for injuries to employes engaged in such employments is in contravention of the Constitution of the United States, as destructive of the uniformity in maritime law which the Constitution was designed to establish, and has been so held by the Court; the subsequent amendment of the Judicial Code of the United States by Congress, attempting to allow the states to extend their workmen's compensation laws to maritime employments, is likewise unconstitutional and for the same reasons; the uniformity of the maritime law is preserved by the Constitution, and no new remedies can be created in the maritime law except by Act of Congress establishing a uniform law, to be administered by the United States Courts.

2. The New York Workmen's Compensation Law, as applied to maritime employments, is also unconsti-

tutional in that an essential part of the Law bars rights of action in admiralty, which cannot be barred by legislation of the states.

V.

THE NEW YORK WORKMEN'S COMPENSATION LAW.

The Law is Chapter 816 of the Laws of New York of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the consolidated Laws, as amended by Chapter 316 of the Laws of 1914, and by Chapters 167, 168, 615 and 674 of the Laws of 1915, and by Chapter 622 of the Laws of 1916, and by Chapter 705 of the Laws of 1917.

Chapter 249 of the Laws of 1918, effective prior to the award in this case, re-enacts the portions of the law constituting Groups 8 and 10, relating to operation and repair of vessels and longshore work. These sections were re-enacted in exactly the same form as before. This re-enactment was on account of the Jensen decision in this Court, which we will refer to later.

The law, after defining 45 groups of industries to which it applies, provides in Section 10 as follows:

> "Liability for Compensation. Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of

himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty."

It is provided that the liabilty thus prescribed shall be exclusive unless the employer fails to secure the payment of such compensation in the manner required by the law (Sec. 11.)

The option is given the employer to secure such compensation by payment of premiums to the State and thus insuring in the State fund, to insure with insurance companies, or to carry his own insurance (Sec. 50.)

For failure to pay or provide compensation the employer, in addition to being liable to a suit by the injured employee, with the ordinary common law defenses abolished, or liable for compensation at the workmen's election (Sec. 11), is liable to a penalty equal to the *pro rata* premium which would have been payable for insurance in the State fund during the period of non-compliance with the Law (Sec. 50.)

In Section 15 of the Law is a schedule setting forth the amount of compensation payable to the employee for various kinds of disability therein specified; and in Section 16 is provided the compensation payable to the representatives of deceased workmen.

In addition to the payment of compensation the employer must furnish the employee with such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or requested by the employee during sixty days after the injury (Sec. 13), and in case of the death of the employee, the employer must pay the reasonable funeral expenses (Sec. 16.)

It is presumed that all claims made for compensation come within the law and that sufficient notice

has been given in the absence of substantial evidence to the contrary (Sec. 21.) The right of compensation is preferred without limit of amount against the assets of the employer (Sec. 34.)

The amount of the compensation depends upon the extent of the disability and the average earnings of the workman (whether the earnings are from the present employer or not) if he has worked steadily in the employment in which he was injured, but otherwise upon his earning capacity as measured by the earnings of those who have worked in the same trade. In case of death it depends also upon the number of legal dependents and the length of time they live (Secs. 14-16.)

The only alternative that the employer has to the payment of the arbitrary sums specified in the schedules of the law is to pay to the State Fund or to some insurance company a premium of from a fraction of 1 per cent. to about one-third of the pay-roll.

Certain features of the operation of the law may here be pointed out.

(a) The law imposes no rule of conduct upon the employer with respect to conditions of labor in the various industries covered by the law. It imposes no duty with regard to the place where the workmen shall work, the character of the machinery, tools or appliances to be used, the rules or regulations to be promulgated for the safety of those employed in and about the industry. It prescribes no safeguards or safety appliances. There is not a word in the law dealing with the health, comfort, or safety of the employee, or the conditions of labor.

(b) It imposes liability on the employer although

he is carrying on a lawful business in a lawful manner, although he has used every precaution that human foresight and ingenuity can devise, although the accident was caused by the wrongful act of a third party or by vis major. The Court of Appeals has said:

> "Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made." Winfield v. New York Central, etc., R. R. Co., 216 N. Y. 284, 289.

(c) It imposes liability upon the employer to pay compensation to the employee for injuries caused solely by the negligence of the employee himself, no matter how gross.

(d) The amount of money that is taken from the employer to compensate the employee, is arbitrary, and is not based upon the actual damage suffered or loss sustained by the injured employee.

(e) There is no limitation upon the period of time for which compensation for permanent total disability or death must be paid. Compensation is payable so long as the injured man or the designated dependents live.

(f) While the law purports to deal with those engaged in hazardous employments, nearly all the recognized industries are included within the law. Substantially all employments are declared hazardous, whether they are so in fact or not.

(g) The mere filing of a claim for compensation puts upon the employer the burden of disproving the claim by substantial evidence. Jurisdictional facts including the fact of notice are presumed (Sec. 21.)

(h) The law has been held to be extra-territorial in its operation. It applies to injuries happening outside the State as well as to injuries happening within the State. Matter of Post v. Burger, 216 N. Y. 544.

(i) The law is compulsory on all employers engaged in the classes of business to which it applies. The employer has no election to pay compensation or to be liable to suit with the common law defenses abolished, as he has under most other workmen's compensation laws. If he refuses to comply with the provisions of the law, he is not only penalized and liable to a common law suit with the common law defenses abolished, but at his employee's election he is also liable for the compensation provided in the law.

VI.

HISTORY OF PREVIOUS DECISIONS AND SUBSEQUENT LEGISLATION UPON THE SUBJECT OF THE CONSTITUTIONALITY OF THE NEW YORK WORKMEN'S COMPENSATION LAW.

The constitutionality of the Law in its present form was challenged before this Court in the cases of:

Southern Pacific Co. vs. Jensen, 244 U. S. 205.
Clyde Steamship Co. vs. Walker, 244 U. S. 255.

In these cases, this Court held that the Law was invalid upon the three following grounds:

1. That it was *unconstitutional* and in contravention of Article III, Section 2 of the Constitution of the United States.

2. That it was in conflict with the Judicial Code of the United States.

3. That it was in conflict with the expressed policy of Congress regarding shipping.

After the Jensen decision had been handed down, Congress by Act of October 6th, 1917, amended Sections 24 and 256 of the Judical Code of the United States, so as to add the following exception to the exclusive grant of jurisdiction to the Courts of the United States:

> "Saving to suitors in all cases, the right of a common law remedy when the common law is competent to give it, *and to claimants, the rights and remedies under the Workmen's Compensation Law of any State.*" The portions in italics are the new matter added by the amendments.

By these amendments Congress has disposed of the second and third grounds upon which this Court had held the Law to be invalid, but the first ground, the unconstitutionality of the law, cannot be overcome by Act of Congress.

After the amendment of the Judical Code by Congress above referred to, the New York State Legislature re-enacted Groups 8 and 10, of the Workmen's Compensation Law, relating to operation and repair of vessels, and to longshore work, in exactly the same form as before, the reason for said re-enactment being stated (Sec. 1, Laws of 1918, Chapter 249) in the law, which recites that these groups "having been declared unconstitutional by the United States Supreme Court as conflicting with the admiralty jurisdiction of the United States, but subsequently authorized by act of Congress, are hereby re-enacted."

Point 1.

William M. Stewart, the husband of the defendant in error, was at the time of his death engaged in a maritime employment, under a maritime contract, upon navigable waters; the New York Workmen's Compensation Law, when applied to awards made for injuries to employes engaged in such employments is in contravention of the Constitution of the United States, as destructive of the uniformity in maritime law which the Constitution was designed to establish, and has been so held by the Court; the subsequent amendment of the Judicial Code of the United States by Congress, attempting to allow the states to extend their workmen's compensation laws to maritime employments, is likewise unconstitutional and for the same reasons; the uniformity of the maritime law is preserved by the Constitution, and no new remedies can be created in the maritime law except by act of Congress establishing a uniform law, to be administered by the United States Courts.

The work of unloading a vessel is a maritime employment and is in performance of a maritime contract. This was held in the cases of:

Atlantic Transport Co. vs. Imbrovek, 234 U. S., 52.
Southern Pacific Co. vs. Jensen, 244 U. S., 205.
Matter of Anderson vs. Johnson Lighterage Co., 224 N. Y., 1.
Matter of Doey vs. Howland Co., 224 N. Y., 30.
Matter of Keator vs. Rock Plaster Co., 224 N. Y., 2.

The New York Workmen's Compensation Law, when applied to a claim arising from injuries received in a maritime employment, was held by this Court to

conflict with Article III, Sections 1 and 2 of the Constitution of the United States, *and* with the Judicial Code of the United States, in *Southern Pacific Co. vs. Jensen* (224 U. S., 205.) The decision is stated to rest upon the following *three separate grounds* (pages 217-218):

> 1. If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be the destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish, and freedom of navigation between the states and with foreign countries would be hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in The Roanoke (189 U. S., 185.) The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.
>
> 2. Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, "saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any Court and is not saved to suitors from the grant of exclusive jurisdiction.
>
> 3. And finally this remedy is not consistent with the policy of Congress to encourage investments in ships, etc.

By this decision the law was held unconstitutional.

After the Jensen decison had been handed down, Congress by Act of October 6th, 1917, amended Sections 24 and 256 of the Judicial Code partly above quoted, so as to read "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state."

These amendments may meet and overcome the second and third objections of this Court in the Jensen case, but not the first, nor can Congress by any act dispose of the first objection, for a law held unconstitutional by the Supreme Court cannot be made constitutional by any act of Congress.

This law has therefore been definitely and clearly stated to be beyond the power of a state to enact over navigable waters. As long as the Jensen decision stands, awards made for accidents or injuries received in maritime employments are inevitably invalid.

The basic reasoning of the decision is clear. The uniformity of the maritime law is preserved for all time in the Constitution.

In *The Lottawanna* (21 Wall. 558) Mr. Justice Bradley said:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have intended to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

This statement of principle has remained unchallenged for forty-five years.

Congress has power to amend or create the maritime law which shall prevail throughout the country (Butler vs. Boston & Savannah Steamship Co., 130 U. S. 527; in re Garnett, 141 U. S. 1, 14), but that is the limit of its power. It cannot delegate this power to the states, nor, under the limitation of the Constitution, authorize the enactment of laws that will destroy the uniformity of the maritime law.

In the *Jensen* case this Court said:

> "Where the subject is national in its character, and admits and requires uniformity of regulations * * * * Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject *is equivalent to its declaration that commerce in that matter shall be free.*"
>
> "And the same character of reasoning which supports this rule, we think, makes imperative the stated limitations upon the power of the States to interpose where maritime matters are involved." (The italics are ours.)

It follows that if the new and revolutionary principle of compensation, involving the creation of a liability without fault, hitherto unknown in any system of law, is to be extended to maritime employments, this must be done by a law enacted by Congress establishing a uniform system throughout the country.

And, as stated in the last preceding quotation, "the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free," Congress having enacted no maritime compensation law, its failure to do so is therefore the equivalent of an act of Congress declaring that the compensation principle shall not extend to maritime employments.

POINT 2.

The New York Workmen's Compensation Law, as applied to maritime employments, is also unconstitutional in that an essential part of the Law bars rights of action in admiralty, which cannot be barred by legislation of the states.

Employers, upon complying with the law, are given complete immunity from suits to recover for disabilities sustained by their workmen in the course of the employment. After providing in Section 10 that compensation for injuries shall be paid according to the schedules of the law, it is provided in Section 11 that

> "the liability prescribed by the last preceding section shall be exclusive, except * * * * an employer fail to secure the payment of compensation * * * *"

The exclusiveness of the law is a most vital feature. As the Court of Appeals said in Jensen v. Southern Pacific Co., 215 N. Y. 514:

> "Exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme." (p. 21.)

The law in terms applies to workmen engaged in the operation of New York vessels wherever the vessel may go (Sec. 2, Group 8) and to those engaged in longshore work. The seamen's work is always upon vessels and the longshoremen's work is largely done on shipboard.

When an accident happens on shipboard a claim arises within the admiralty jurisdiction of the Courts of the United States and suit may be brought in admiralty against the ship owner, the vessel, or the employer of the workman. Atlantic Transport Company v. Imbrovek, 234 U. S. 52.

Accordingly, a seaman or a longshoreman injured while upon a vessel may have recourse to the District Courts of the United States for the enforcement of his rights. He has a lien upon the vessel through whose fault he was injured and this lien is a property right which does not abate even upon the death of the libellant. The Transfer No. 12; 221 Fed. 409.

The right of action given by the maritime law is not subject to modification by the law of the various states. In reposing admiralty jurisdiction in the Courts of the United States Congress has given them the exclusive power to state and enforce the admiralty law and has withdrawn this subject entirely from the power of the states. It is well settled that the jurisdiction of the admiralty courts cannot be increased, diminished or modified by state decisions or enactments.

By Section 2 of Article III of the Constitution of the United States it is provided that

> "The judicial power shall extend * * * * to all cases of admiralty and maritime jurisdiction."

By Section 1 of Article III it is provided that

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

By Section 24, Par. 3, of the Judicial Code of the United States (Act of March 3, 1911; 36 Stat. L. 1091) Congress has conferred upon the District Courts of the United States original jurisdiction "of all civil cases of admiralty and maritime jurisdiction."

In the case of The Lottawanna, 21 Wall. 558, after speaking of the provision of the Constitution conferring admiralty and maritime jurisdiction upon the

Courts of the United States, this Court said at page 575:

> "The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states * * *"

The jurisdiction conferred upon the Courts of the United States is jurisdiction to hear the controversy and determine it according to the accepted principles and rules of maritime law. It is not jurisdiction merely to apply the local law of the various states as that law may be determined by decisions of the Courts or by legislative enactments. This is well shown by the case of Workman v. New York City, 179 U. S. 552.

There the owner of a vessel filed a libel against the City of New York to recover the damages caused by the negligence of those in charge of a fireboat belonging to the Fire Department of the City. At law there could have been no recovery because the City was at the time engaged in a governmental function. This Court held that the owner of the vessel had a right of action in admiralty, however, and could recover in the Courts of the United States having admiralty jurisdiction the damages which he had sustained. The Court said at page 557:

> "The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject matter is within the cognizance of such courts and when the wrong-

doer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein."

This proposition the Court held was unfounded. At page 558 it said:

"The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

See also The Max Morris, 137 U. S. 1; The Thode Fagelund, 221, Fed. 685.

It follows that whatever power a State may have to take from the injured workman his common law right of action, it cannot take from him his cause of action in admiralty. *The Fred. E. Sander*, 208 Fed. 724; *The Rosalie Mahony*, 218 Fed. 695, 698.

We have pressed this point in our argument because we believe that it embodies the most serious prac-

tical difficulty to allowing compensation laws of the states to operate within the jurisdiction of the maritime law.

The principle of all compensation laws is practically the same. They substitute compulsory insurance for previous liabilities existing under common and statute laws. If they are not effective to bar other remedies, the employer must carry a heavy burden. He must pay, under the New York law, for insurance of all employes engaged in maritime occupations, and he is, if the act be valid, subject to liability in admiralty in case of fault.

The whole scheme of the law thus fails in maritime employments. Compensation is only given by the law *if other remedies are barred.* If they cannot be barred in admiralty, an anomalous situation exists. The law would be not only enforced but enlarged far beyond the point that any state legislature has attempted to carry the compensation principle. It is not the intent, nor is it the effect of the New York law to give compensation in cases where other liability exists. To hold that the law is constitutional in maritime cases, *amends* the New York law. It is impossible to enforce it in maritime matters as it stands.

Another view is that expressed in the opinion by Mr. Justice Hand in *The Steam Lighter Howell* (U. S. Dist. Court, Southern District of New York, March 6th, 1919. Not reported.) In this case, which is now on its way, we understand, on appeal to this Court, it is actually held that causes of action in admiralty are effectually barred by the New York Workmen's Compensation Law, upon the ingenious reasoning that the *remedy* is not interfered with, but the underlying cause of action is eliminated, and the remedy becomes inoperative. In view of the great weight of authority the

other way, we do not believe that this Court will adopt the views of Mr. Justice Hand.

But one or the other position must eventually be taken. Either the State of New York, and all other states, must be allowed to make this inroad upon the maritime law, or their compensation acts must be held not to apply to maritime employments and to that extent to be invalid and unconstitutional.

That a middle course should be adopted by a construction which would amend the New York law by allowing compensation where the law itself does not give it, namely, in cases where other remedies are not barred, is unthinkable.

LAST POINT.

The judgment of the Court of Appeals of the State of New York should be reversed with costs.

Respectfully submitted,

FRANK R. SAVIDGE,
Attorney for Plaintiff in Error.

FREDERICK M. THOMPSON,
Of Counsel.

IN THE

Supreme Court of the United States

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

FRANK R. SAVIDGE,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

October Term, 1919. No. 543

KNICKERBOCKER ICE COMPANY

Plaintiff in Error

AGAINST

LILLIAN E. STEWART

Defendant in Error

SIRS:

Please take notice that a motion will be made at a session of this Court appointed to be held on the 19th day of April, 1920, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for leave to file as a supplemental brief on behalf of the plaintiff in error, a copy of the opinion of the Supreme Court of the State of California in the case of Sudden & Christenson, a corporation, vs. The Industrial Accident Commission of the State of California, *et al.*, handed down very recently and since the argument and submission of the instant case.

Dated, New York, N. Y., April 10, 1920.

FRANK R. SAVIDGE
45 Cedar St., New York
Attorney for Plaintiff in Error

To:

Hon. Charles D. Newton, Attorney General,
Attorney for State Industrial Commission,
Capitol, Albany, N. Y.
Hon. E. C. Aiken, Deputy Attorney General, of
Counsel, Capitol, Albany, N. Y.

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

AGAINST

LILLIAN E. STEWART,
Defendant in Error.

And now comes Knickerbocker Ice Company, the plaintiff in error, and moves this Court to grant leave to file as a supplemental brief on behalf of the plaintiff in error, a copy of the opinion of the Supreme Court of California in the case of Sudden & Christenson, a corporation, vs. The Industrial Accident Commission, *et al.*, very recently handed down and not yet reported.

STATEMENT AND REASONS FOR FILING

Since the argument in the instant case, the Supreme Court of California has had before it a similar case, and in a carefully considered and well reasoned opinion, of which this Court should have the benefit, has held that the Act of October 6, 1917, purporting to amend the Judicial Code so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any State, is unconstitutional in that it violates Article III, Section 2, of the Con-

stitution of the United States. This opinion refers to and discusses the decision of the Appellate Division of the Supreme Court of New York, which is appealed from in the case at bar, and reaches the conclusion contended for by plaintiff in error.

FRANK R. SAVIDGE,
Attorney for Plaintiff in Error

No. 648 OCTOBER TERM, 1919

Office Supreme Court, U. S.
FILED
APR 19 1920
JAMES D. MAHER,
Clerk.

IN THE

Supreme Court of the United States

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error.

Supplemental Brief on Behalf of Plaintiff in Error Filed by Permission of the Court.

FRANK R. SAVIDGE,
45 Cedar Street, New York,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

October Term, 1919. No. 543

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error,

INTRODUCTORY STATEMENT.

This brief is filed by permission of the Court, and consists solely of the recent opinion of the Supreme Court of California, as yet unreported, in the case of *Sudden & Christenson, A Corporation, Petitioner, vs. The Industrial Accident Commission of the State of California, A. J. Pillsbury, Will J. French and Meyer S. Lissner, as members of and constituting said Commission, and Maria Soarez and Carmina Soarez, by Mira Soarez, her guardian ad litem, Respondents, S. F. No.* 8882. 37 Calif. 310

This was a case similar in its essential facts to the instant case, and the Court refers to the decision of the Appellate Division of the Supreme Court of New York, which is here appealed from, and after carefully considering it reaches an opposite conclusion, and holds that the Act of October 6, 1917, purporting to amend the Judicial Code so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state, is unconstitutional, in that it violates Article III, Section 2, of the Constitution.

OPINION FILED AS SUPPLEMENTAL BRIEF

The opinion in full is as follows:

LENNON, *J.*:

"*Certiorari* to review the action of the Industrial Accident Commission in awarding death benefits to respondents Maria and Carmina Soarez. The deceased, Joe Soarez, died as the result of an accidental injury sustained by him while employed as a stevedore on the deck of petitioner's vessel which was at the time discharging a cargo of lumber at a San Francisco dock.

"The rights and liabilities of the parties in connection with the injury and death of Soarez were matters clearly within admiralty jurisdiction, and, prior to the amendment of the Judicial Code in 1917, the application of the California Workmen's Compensation Act would have been an unwarranted invasion of the admiralty jurisdiction of the federal courts. (*Southern Pacific Company vs. Jensen*, 244 U. S. 205.)

"At the time the decision in the Jensen case was rendered, sections 24 and 256 of the Judicial Code gave to the District Courts of the United States, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases, the rights of a common law remedy, where the common law is competent to give it." (36 *Stat. at L.* 1091, 1160, Chap. 231; *U. S. Comp. Stat.* 1916, Sections 991 (1), 1233.) By act of October 6, 1917, hereinafter referred to as "the amendment," Congress amended the Judicial Code to extend the saving clause to secure "to claimants the rights and remedies under the Workmen's Compensation Law of any state." (Act. Oct. 6, 1917, c. 97, 40 *Stat. at L.*, 395, Sec. 2; *Fed. Stat. Ann. Suppl.* 1918, pp. 401, 414; *U. S. Compiled Statutes Temporary Supplement* 1917, Sec. 991, p. 37, and Sec. 1233, p. 39.)

"Petitioner resists the application of the amendent in support of the award in the instant case upon the ground

that the said amendment is in conflict with Article III, Section 2, of the United States Constitution and therefore wholly void.

"Article III, Section 2, of the Constitution provides that the judicial power of the federal courts shall extend to all cases of admiralty and maritime jurisdiction. It is the theory of petitioner that the existing law of the sea was impliedly designated by this provision to furnish the rules by which the rights of litigants in maritime cases were to be determined. The correctness of this theory is not open to question. (*Benedict's Admiralty,* 4th Ed., Sec. 139; *Willoughby on the Constitution,* Chap. LV; *The Genessee Chief,* 12 How. 443; *The Lottawanna,* 21 Wall. 558; *Workman vs. New York,* 179 U. S. 552; *Southern Pacific Company vs. Jensen, supra.*) Nor is it open to serious question that the reason for this implied adoption of the existing law of the sea as the basis and groundwork of the maritime system of the nation was to withdraw the rules and limits of maritime law from the disposal and regulation of the several states, thereby securing that uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other and with foreign nations. (*The Lottawanna, supra; Southern Pacific Company vs. Jensen, supra.*) Whether or not the amendment to the Judicial Code assumes to authorize under federal sanction the exercise of a power of disposal and regulation over the rules and limits of maritime law which would be fatal to that uniformity and consistency which it was one of the primary objects of the constitution to secure is the question now presented for our determination.

"On behalf of the respondents, the suggestion is made that the numerous decisions upholding the constitutionality of the old "saving to suitors" clause of the Judicial Code foreclose all discussion to the instant case for the reason

that the present amendment is merely an expansion of that clause. The difficulty with this reasoning lies in the fact that the original "saving clause" saved *remedies* only, whereas the amended clause saves not only remedies but *rights* as well. Under the original clause, the substantive law, wherever administered, was for maritime cases the law of the sea. (*Chelentis vs. Luchenbach S. S. Co.*, 247 U. S. 372.) The old "saving clause" did not, therefore, interfere with the uniform and harmonious operation of the maritime law, and consequently, it did not violate the constitution. It by no means follows, however, that the same may be said of the clause as expanded to save to claimants the rights and remedies under the workmen's compensation law of any state. By the statute as so amended, Congress has adopted as part of the substantive maritime law of the nation the rules governing liability in the case of industrial accidents contained in the workmen's compensation acts of the several maritime states. In general these acts, like that in force in this state, are exclusive in character; that is to say, where applicable at all, they furnish the *sole* basis for recovery in the case of industrial accidents. It follows that in states having this type of statute Congress has wholly abolished all liabilities under the general maritime law arising out of industrial accidents (*The Howell*, 257 Fed. 578.). The workmen's compensation acts in the various states are widely divergent in their terms. Moreover, if it be true, as it undoubtedly is, that the amendment must be interpreted prospectively, there is no visible limit to the possible future divergence between the terms of these laws. Finally, when it is considered that the courts have upheld clauses in the workmen's compensation acts giving to those statutes an extraterritorial effect, it is at once apparent that the rules adopted by Congress to govern the liabilities of the parties in the case of maritime

accidents cannot fail to present an aspect of "confusion worse confounded." The question in the instant case, therefore, is whether or not the divergence and confusion so created in the substantive law of the sea interferes with the proper harmony and uniformity of the maritime law in its international and interstate relations which it was the aim of the constitution to secure.

"The constitutionality of the amendment to the Judicial Code has been upheld in *Stewart vs. Knickerbocker Ice Co.*, 123 N. E. (N. Y.) 383. The reasoning upon which the decision in that case was based is stated as follows by the Court of Appeals of New York: "In view of the close division of opinion amongst the learned justices of the Supreme Court, involved in the decision of the Jensen case, and in view of the concession made in the prevailing opinion that it was difficult to determine just how far the jurisdiction of the federal courts in maritime matters might be limited or affected by such legislation, we think that we are justified in assuming that the Congress has acted within its powers under the constitution when, after due consideration, it has confided to the states the power to enact and enforce Workmen's Compensation Acts in respect of injuries received in the course of maritime employment. We think that it would be altogether an unjustifiable concession of lack of state jurisdiction in this field of compensation to injured workmen or their dependents, if, after this amendment by the Congress, we should hold that our statute was unconstitutional.

"This reasoning appears to us to be based upon a misconception of the Jensen case. It is true that in that case four justices dissented, but it is in the prevailing opinion that we must seek for a statement of the law as established by the decision of the Court. It is also true that that opinion concedes the difficulty of determining the exact extent

to which state legislation may limit or affect maritime rights and states that, considering the former opinions of the Court, it must now be accepted as settled doctrine that . . . ; . . . Congress has paramount power to fix and determine the maritime law which shall prevail through the country.' The Court did not seem to imply, however, that Congress in the exercise of this 'paramount power' or that the state legislature in the exercise of their somewhat indeterminate authority could destroy the uniformity of the maritime law which it was the aim of the constitution to secure. That the uniformity of the maritime law is guaranteed by the constitution itself is unequivocally stated and restated in the opinion of the Court. That such, indeed, was the fundamental basis of the prevailing opinion is clearly recognized in the opinions of the dissenting justices. Since, therefore, it has been determined that, whatever may be the power of Congress or of the state legislatures in maritime matters, the constitution itself guarantees the uniformity of the maritime law, we can see no escape from the necessity of considering whether or not the amendment to the Judicial Code destroys the uniformity so guaranteed.

"Respondents contend that by granting to Congress the power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, the framers of the constitution evinced a purpose to secure consistency and uniformity of regulation identical with that evinced by extending the judicial power of the federal courts to all cases of admiralty and maritime jurisdiction. With this contention as a basis, respondents argue that the case of *Clark Distilling Co. vs. Western Maryland R. Co.*, 242 U. S. 311, which upholds the constitutionality of the Webb-Kenyon Act, is a conclusive authority in favor of the constitutionality of the enactment which we are now considering. The position of respondents in this behalf is

squarely sustained by the opinion of Judge Hand in *The Howell, supra.* The learned Judge held, in effect, that the Clark Distilling Co. case established the proposition that as to any matters over which Congress has jurisdiction, it may allow state legislation untrammeled until such time as in its own pleasure it may choose to assume explicit legislative control. While we have the utmost respect for the learning and ability of the author of that opinion, after mature deliberation we are constrained to disagree with his conclusion.

"In *Clark Distilling Co. vs. Western Maryland R. Co., supra,* the United States Supreme Court held that Congress had power to forbid 'the interstate shipment or transportation of intoxicating liquor which was intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.' It was claimed 'that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things was wanting in uniformity.' It is not, we think, open to serious question but that this claim would be sound as applied to any ordinary article of commerce, or, but that it would have prevailed with the court had liquor been regarded, as it once was, as an ordinary article of commerce. (*Bowman vs. C. & N. W. R. Co.,* 125 U. S. 465; *Vance vs. Vandercook Co.,* dissenting opinion, 170 U. S, 438, 457.) The United States Supreme Court has shown an unmistakable inclination to uphold restrictions upon traffic in liquor without openly declaring that liquor was not an ordinary article of commerce. In so doing, the court has resorted to applications of constitutional principles which

would not have been applied in like manner to uphold restrictions upon traffic in lumber or cotton which were similar in their scope and effect. (See *Willoughby on The Constitution,* Section 317, 321, inclusive.) This fact is recognized by the Chief Justice in the closing paragraph of the opinion in the Clark Distilling Co. case:

> 'Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. *The fact that regulations of liquor have been upheld in numerous instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied.* In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.' (The italics are ours.)

"The difference between the character of the Webb-Kenyon Act and the amendment to the Judicial Code now

under consideration, as well as the difference between the subjects of which these two laws treat is manifest. The one deals with certain property the abuse of which is a menace to society. The other deals with ships (of whose vital importance to the welfare and even to the life of the nation the recent war furnishes a vivid reminder) and subjects them at once and the same time to the varying, and even conflicting, laws of the many states at whose ports they must call in the course of their necessary wanderings. As stated in *The Lottawanna, supra;* 'The general system of maritime law which was familiar to the lawyers and statesmen of the country when the constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" * * * One thing, however, is unquestionable; the constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country.' There was no general system of liquor laws designed to be preserved by the constitution. Indeed the subject matters of the two enactments which respondents seek to link together are so vitally and patently different in nature, purpose, history and circumstance that we find it impossible to conceive that the question of the constitutionality of one is conclusively determined by the ruling on the constitutionality of the other. We therefore consider ourselves not only free but also under a manifest and unescapable duty to consider on its own merits the question as to whether or not the Judicial Code as amended in effect destroys the uniformity of the admiralty and maritime law, which, like the law merchant, is always national, even international, in character, and necessarily so to fulfill its mission.

"It is only in case the state workmen's compensation acts merely assume to regulate matters of a local nature

admitting of diversity of treatment according to local necessities that their adoption by Congress as part of the maritime law would not be destructive of that uniformity which it was the aim of the constitution to secure. (*Gibbons vs. Ogden*, 9 Wheat. 1; *Port Richmond Ferry vs. Hudson County*, 234 U. S. 317; *Wilmington Transportation Co. vs. Cal. R. R. Comm.*, 236 U. S. 151; *Wabash, etc. R. Co. vs. Illinois*, 118 U. S. 557.) That such, however, is not the nature and effect of the workmen's compensation acts has been conclusively determined by the United States Supreme Court in *Southern Pacific Co. vs. Jensen, supra.* In this behalf the Court said: 'If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destructive of the very uniformity in respect to maritime matters which the constitution was designed to establish; and the freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke.*' (189 U. S. 185). 'The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. *So applied, it conflicts with the constitution and to that extent is invalid.*' (The italics are ours.) After admitting that state legislation may to some extent change or modify the general maritime law and after refusing to attempt to define with exactness just how far such changes and modifications are valid, the Court continued: 'And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its interna-

tional and interstate relations. *This limitation, at least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself.'* (The italics are ours.) The decision in the Jensen case was based, therefore, upon the conclusion that the Workmen's Compensation Act of New York, as applied to maritime accidents did work material prejudice to the characteristic features of the general maritime law and did interfere with the proper harmony and uniformity of that law in its relation to international and interstate relations.

"It is true that this language was used of the Workmen's Compensation Act of New York as applied to maritime accident *exproprio vigore*. But by no possible process of reasoning can it be asserted that that act, or any of the other varying and conflicting workmen's compensation acts of the several maritime states, can have the effect of destroying the uniformity of the general maritime law when their force is derived from the respective state legislatures, but that these identical acts have precisely the opposite effect when their force is derived from the act of Congress. If the Workmen's Compensation Act of New York, or of California, operating in the field of maritime accidents by the act of the State legislature would have the effect of inflicting upon commerce a far more serious injury than that which would have resulted from the Washington statute authorizing a material man's lien which was condemned in *The Roanoke, supra,* its effect in the same field can be no less injurious and no more consonant with the uniformity of regulation which it was the aim of the constitution to secure if its operation is extended to that field by the act of Congress. If the effect of the statute as enacted by the state legislature was to make its application to maritime accidents a violation of the constitution of the United States by reason of the fact that it destroyed the uniformity of the

law of the sea, such must of necessity be its effect when enacted by Congress, for the identical conflicts and inconsistencies are adopted and perpetuated.

"We, therefore, conclude that the amendment to the Judicial Code is unconstitutional in that it violates Article III, Section 2, of the constitution of the United States.

"The award is annulled.

LENNON, *J.*"

"We concur:
"SHAW, *J.*
"WILBUR, *J.*
"LAWLER, *J.*
"ANGELLOTTI, *C. J.*"

Respectfully submitted,
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Office Supreme Court, U. S.
DEC 16 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

December Term, 1919, No. 543.

KNICKERBOCKER ICE COMPANY,
Plaintiff in Error,

vs.

LILLIAN E. STEWART,
Defendant in Error.

Brief filed by permission of the Court on behalf of the Knickerbocker Ice Company, plaintiff in error by Mark Ash (as *amicus curiae*) representing the Newtown Creek Towing Company.

Introduction.

This brief is presented by counsel at the request of the Newtown Creek Towing Company, which is interested in the instant case before this court by reason of the following:

John McAllister, while in the employ of the Newtown Creek Towing Company, as a deckhand on its tugboat "Reliance" was on September 12th, 1918, while the vessel was navigating in the waters of Newtown Creek, which empties into the East River, New York, was missed from the vessel and on September 15th, 1918, the dead body was recovered from the waters of that creek.

Annie McAllister, the mother of the deceased, filed a claim for compensation with the New York State Industrial Commission on behalf of a daughter and three sons, as dependents of the deceased.

The Commission found that the deceased, while engaged in the regular course of his employment as a deckhand on the tug, owned and operated by his employer, the Newtown Creek Towing Company, was missed from the vessel and his body was later recovered on September 15th, 1918, from the waters of Newtown Creek.

At the hearing before the Commission, the Newtown Creek Towing Company, raised the objection, among others, that the Workmen's Compensation Law of New York was unconstitutional in violating Sec. 2 of Article 3 of the Federal Constitution, as applying to the claim before it, the deceased having met his death while engaged in maritime employment under a maritime contract, and that the amendments by Congress of Sections 24 and 256 of the U. S. Judicial Code were likewise in violation of the article of the Federal Constitution referred to.

Despite this objection, the Commission awarded to each of the brothers and sister of the deceased as dependents, $2.275 weekly until they respectively arrive at the age of eighteen years. If this award stands, the employer, Newtown Creek Towing Company, will be required to pay to these alleged dependents a total of $3,194.10.

An appeal was taken from this award of the Commission by the Newtown Creek Towing Company to the Appellate Division of the New York Supreme Court, Third Department, and there,

among others, the constitutional point referred to was raised and urged, but the Appellate Division declined to hear argument on the constitutional question and reserved decision until the decision of this court in the instant case.

As the decision in the instant case will determine the constitutional point pending before the Appellate Division in our case, the permission is asked to present this brief upon that single point.

Moreover, since the passage of the Act of Congress amending the Judicial Code, conflicting decisions have been rendered by the District Courts as to the effect of the amendment. In *The Howell* 257 Fed. 578, it was decided in the New York District that since the amendment, a person suffering injuries while engaged in maritime employment under a maritime contract, has no longer any rights under the general maritime law, as the New York law makes the remedy thereunder exclusive and Congress has validated that statute. On the other hand, in *Rohde* v. *Grant Smith Porter Co.*, 259 Fed. 304, in the Oregon District, it was held that notwithstanding the amendment by Congress, the Oregon Compensation Law is not exclusive and the rights of an employee seeking redress for injuries occurring on navigable waters, while he was at work on a vessel, must be measured by the maritime law, and this right cannot be barred, enlarged or taken away by state legislation.

FIRST POINT.

The Act of Congress of October 6, 1917, amending the U. S. Judicial Code, § 24 and 256, has not removed the unconstitutionality of the Workmen's Compensation Law, as declared by this Court in Southern Pacific Co. v. Jensen, 244 U. S. 205.

Inasmuch as this court is familiar with the *Jensen* case, it is not considered proper to quote from it *in extenso*, but simply to refer to such parts of it in connection with other authorities as bear upon our contention, that the unconstitutionality of the Workmen's Compensation Act still exists as to claims for injuries received by seamen engaged in the performance of a maritime contract—notwithstanding the Act of Congress of October 6, 1917, which amended the Judicial Code, §§ 24 and 256, giving exclusive jurisdiction to the Federal Courts of all cases of admiralty and maritime jurisdiction, so as to read:

> "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, *and to claimants the rights and remedies under the workmen's compensation law of any state.*"

Section 11 of the N. Y. Workmen's Compensation Law provides that the liability of an employer:—

> *"shall be exclusive and in place of any other liability whatsoever,* to such employee, his personal representatives, husband, parents,

dependents or next of kin, or anyone otherwise entitled to recover damages, *at common law or otherwise* on account of such injury or death."

This section was enacted in conformity with the constitutional amendment added in 1913 to the New York State Constitution (Article 1, Section 19) permitting the legislature to fix the right to compensation to be paid by an employer from injuries received in the course of his employment and to provide that "the right to such compensation and the remedy therefor *shall be exclusive of all other rights and remedies*", and the N. Y. Court of Appeals has decided that the remedy provided is exclusive, and an action can no longer be maintained under the New York Statute (Code sections 1902-1903), by an administratrix to recover damages for wrongful acts, causing death. (*Shanahan* vs. *Monarch Engineering Co.*, 219 N. Y. 459.)

If then the Act of Congress of October 6th, 1917, giving to claimants the rights and remedies under the workmen's compensation law of any State, gives an employee or his dependents in case of his death, the exclusive rights under the New York Workmen's Compensation Law, it necessarily follows that seamen, longshoremen, and others included in group 8, section 2 of this law, suffering injuries while engaged in maritime employment under a maritime contract, have no longer any rights under the general maritime law, and it has been so recently decided by one of the Federal judges sitting in admiralty in New York City. (*The Howell*, 257 Fed. 578.)

The result is that the Act of Congress of October 6, 1917, has destroyed that part of the judicial power exclusively conferred by article 3, section 2 of the Federal Constitution, which provides:

> "The judicial power extend * * * to all cases of admiralty and maritime jurisdiction."

What this judicial power means, was settled a long time ago.

> "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" (*The Lottawanna*, 21 Wallace, 558.)

> "No State Law can enlarge it nor can an Act of Congress or rule of Court make it broader than the judicial power may determine it to be its true limits." (*The Lawrence*, 1 Black, 526-527.)

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as *Chief Justice* Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." (*The Lottawanna*, 21 Wallace, 558.)

> "The judicial power, which among other things, extend to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal Government by the Constitution, and Congress cannot enlarge it, not even to

suit the wants of commerce nor for the more convenient execution of its commercial negotiations." (*The Belfast*, 7 Wallace, 624.)

"If, then, it is the duty of Congress to vest the judicial power of the United States, *it is a duty to vest the whole judicial power.* The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others." (Story, J., in *Martin* vs. *Hunter's Lessee*, 1 Wheat. 304, at 330.)

The cases last cited are the leading authorities in this court, and it is unnecessary to refer to others to the same effect to show that the judicial power is to be determined by the Federal Courts themselves and is not to be limited by any Act of Congress.

In another view, the Act of Congress is unconstitutional for the reason that it has the effect of incorporating into the Federal Law, the New York Workmen's Compensation Law, a local law which does not operate uniformly throughout the whole country.

In the case of the *Lottawanna, supra* (21 Wallace, at p. 576), the Court further says:

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to

> place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *Workman* vs. *New York City*, 179 U. S. 552, in an exhaustive opinion written by Mr. Justice (now Chief Justice) White, in considering whether the liability of a municipality for injuries done by one of its vessels to another, was to be determined by the common law or by the principles of admiralty—he used the following vigorous language (179 U. S., p. 558):

> "The practical destruction of a uniform maritime law which must arise from this premise is made manifest when it is considered that, if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount

> to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution."

and in 179 U. S., at page 561, Mr. Justice White quotes with approval the remarks of Mr. Justice Bradley in the *Lottawanna*, 21 Wallace 576, which we have above extracted.

In *The Chusan*, 2 Story 455 (5 Fed. Cas. 680), Story, J., said:

> "In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and, in the absence thereof, by the general principles of the maritime law. The states have no rights to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have any right to prescribe any rule, they have a right to prescribe all rules to limit, control or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least as far as I have any knowledge, either by any state court or national court within the whole Union. For

> myself, I can only say that, during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject."

This requirement of uniformity to effect changes in the general maritime law, was reiterated in the *Jensen case*, 244 U. S. 205:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Furthermore, if the right given by the New York Compensation Statute is exclusive and this law has been validated by the Act of Congress of October 6th, 19917, amending the Judicial Code, Sections 24 and 256, then it necessarily follows that the right of a vessel owner to limit his liability under the Limited Liability Act of the United States has been taken away.

> "'The liability of the owner of any vessel • • • for any act, matter or thing, loss, dam-

> age, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.'" *U. S. Revised Statutes*, Sec. 4283.

The Supreme Court Rule in Admiralty, LVI, governing the proceedings to be taken by the owner of a vessel for limitation of liability pursuant to the statute, provides:

> "In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act) * * *"

The federal law of limited liability is a part of the maritime law of this country, "and therefore it is co-extensive in its operation with the whole territorial domain of that law,"

Butler v. *S. S. Co.*, 130 U. S. 527, 555.

and this court has by its rules laid down the method whereby the owner of a vessel may not only secure a limitation upon his liability, but may also contest the existence of any liability, including of course liability for injuries to employees.

This right to limit liability is in accordance with the policy of this country to encourage investment in ships.

Southern Pacific Co. v. *Jensen*, 244 U. S. 206.

If then the New York Compensation Act giving an exclusive right has been sanctioned by the Act of Congress in question, then what becomes of that part of the maritime law of this country, which limits the liability of a vessel owner and moreover allows him to contest that liability? The two acts cannot stand together.

It is therefore respectfully submitted that the Act of Congress of October 6, 1917, violates Article 3 of Section 2 of the Federal Constitution, and therefore the constitutional invalidity of the Workmen's Compensation Law, as determined in the Jensen case, still remains.

MARK ASH,
Of Counsel for
Newtown Creek Towing Co.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 543.

KNICKERBOCKER ICE COMPANY, PLAINTIFF-IN-ERROR,

vs.

LILLIAN E. STEWART, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief Filed by Permission of the Court on Behalf of Lillian E. Stewart, Defendant-in-error, by Warren H. Pillsbury (as Amicus Curiæ), Representing the Industrial Accident Commission of the State of California, 525 Market Street, San Francisco, California.

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IN THE

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OCTOBER TERM, 1919.

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KNICKERBOCKER ICE COMPANY, PLAINTIFF-IN-ERROR,

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LILLIAN E. STEWART, DEFENDANT-IN-ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief Filed by Permission of the Court on Behalf of Lillian E. Stewart, Defendant-in-error, by Warren H. Pillsbury (as Amicus Curiæ), Representing the Industrial Accident Commission of the State of California.

Introductory Statement.

This brief is presented by counsel at the request of the Industrial Accident Commission of the State of California. The instant case involves the constitutionality of an act of Congress (chapter 97, 40 Stat., 395, approved October 6,

1917). This act extends to maritime employees the protection of the Workmen's Compensation Acts of the different States by amending sections 24 and 256 of the Judicial Code to this effect. For brevity the act will be referred to in this brief as the "Johnson Amendment" after Senator Johnson, of California, who introduced and pressed it for passage.

In

Southern Pacific Company vs. Jensen, 244 U. S., 205,

decided in June, 1917, this court held, by a divided court, that State Workmen's Compensation acts could not constitutionally apply to maritime workers, because of conflict with the general maritime law. No act of Congress was there under consideration. The Johnson Amendment was soon after passed by Congress in the endeavor to obviate the constitutional points noted in the decision.

The California official and public interest in this matter arises from the fact that the application of the California Workmen's Compensation Act to maritime employments depends, equally with the New York act involved in the case at bar, upon the constitutionality of this act of Congress.

PART I.

PRELIMINARY CONSIDERATIONS AND OUTLINE OF ARGUMENT.

At the outset let it be said that the rule of *Southern Pacific Company vs. Jensen* is not here attacked. Much as counsel admires the reasoning contained in the dissenting opinions in the Jensen case, the present controversy does not call for any reconsideration of the issues there decided. The supremacy of Federal law in the maritime field, including the general (non-statutory) maritime law, in the absence of a definite declaration of Congress to the contrary, there estab-

lished, is not involved in the present question of the constitutional power of Congress.

I. Social and Economic Considerations.

Sound constitutional interpretation endeavors, wherever there is room for choice, to reach that result which will best secure the political, social, and economic interests of the nation.

The problem of relieving the consequences of industrial injuries is a local problem. This is just as true of maritime injuries as of injuries in any other employment. When a stevedore is injured, no part of the burden of supporting himself and his family and of furnishing necessary medical and hospital care falls upon national commerce. It falls entirely upon the community in which he resides, his relatives and friends, public and private charities, and local institutions. If he be permanently crippled, the burden of his care, either to provide vocational re-education where possible, or to maintain him in his crippled condition, falls upon the local community. If he be killed, his burial and the nurture and economic re-establishment of his dependents is a local problem solely.

Of the entire group of maritime workers, the attention of the court is called to the fact that only sailors are nomadic. The rest, longshoremen, stevedores, dock workers, pilots, tug and barge employees, and river and harbor boatmen are permanent residents of the community wherein they are employed. About the same proportion of these workers are married and have families living in the community as for non-maritime employments. The same is largely true of sailors in coastwise shipping. And even of the nomadic class, seamen in interstate and foreign commerce, a fair proportion will have families or at least a home in some State to which they will revert during periods of disability and consequent economic dependence. A State is *morally* en-

titled to charge maritime industry with the relief of this burden cast by it upon the community to the same extent that it charges other industries conducted within the State for the relief of such burden.

> "The police power is the power of the State coextensive with self-protection." *City of Chicago vs. Washingtonian Home of Chicago* (Ill.), 124 N. E., 416.

The law maritime, here referring to the present status of its rules and not to the extent of Federal jurisdiction under it, is archaic, inadequate, and unjust in the extreme to maritime workers. Its rules are on a par with the damage suit and negligence method of redressing injuries sustained by shore employees in the course of their employment, a method now abandoned by forty-two of our States and three Territories in favor of compensation acts. Our Federal Government has also adopted the compensation system for its civilian employees. It previously had this system in substance for many years in its military and naval service in granting pensions against disablement sustained "in line of duty." In England and the British Colonies compensation acts have long since superseded negligence statutes.

Comparing the present status of maritime law with typical workmen's compensation acts:

(1) For *fatol injuries*, tortious or accidental, admiralty gives no relief whatever, apart from State statutes. The California Compensation Act, a typical statute, on the other hand, allows a burial benefit of $100, a death benefit to a widow or other total dependent of thrice the annual earnings, or a death benefit to a parent or other partial dependent of thrice the annual contribution made for the support of such dependent by the employee.

(2) For *non-fatal accidental injuries,* admiralty allows nothing except maintenance, care, and wages to the end of the voyage for sailors. (*The Osceola,* 189 U. S., 158.) For stevedores, longshoremen and other dock workers, nothing at all is given. (*Georgia Casualty Co. vs. American Milling Co.* (Wisc.), 172 N. W., 148.) For boatmen and deck-hands on interior waterways, wages and maintenance to the end of the voyage is infinitesimal, and it is doubtful whether there is any liability for medical and hospital care. Compensation acts, on the other hand, allow for such injuries, medical and hospital care and in addition 50 to 66 per cent of wages weekly during the temporary disability to provide needed support for the disabled employee or his family, as a substitute for the wages in abeyance during idleness.

(3) For *accidental permanent injuries,* such as the loss of an eye or a hand, the law maritime allows only maintenance, wages and care to the end of the voyage for sailors, nothing for stevedores or longshoremen, and substantially nothing for seamen in local commerce. Compensation acts allow a percentage of wages for a period of time fixed by schedule, to enable the employee to re-educate and rehabilitate himself so that he will, if possible, be restored to society as a useful working member. If economic restoration of the injured employee be impossible because of severity of the injury, such compensation acts allow by schedule a larger amount to partially or wholly relieve the community from the burden of supporting the employee for the remainder of his life. The law maritime undertakes no economic rehabilitation of an accidentally crippled employee. That this is entirely wrong and unjust is obvious from the elaborate care now being taken by the Federal Government of its crippled soldiers, giving them vocational education and rehabilitation. Justice requires that the crippled of industry be given the same care as the crippled of war, and this State compensation acts endeavor to accomplish.

(4) For *tortious non-fatal injuries,* admiralty allows to a limited extent recovery of full damages, but only by judicial adoption of common-law rules. Recovery is governed by the rule of divided damages for comparative negligence. Under *The Osceola,* even this is limited to recovery if the injury is due to unseaworthiness of the ship or failure to supply or keep in order proper appliances; if the injury be due to the negligence of the master or of fellow-servants, recovery is denied. Compensation acts allow the same recovery for tortious as for accidental injuries, based mainly upon extent of impairment of earning capacity.

(5) For the enforcement of rights given by maritime law only a damage suit is provided, necessarily long in duration, expensive in maintenance, and full of hazards of litigation. The amount recovered may frequently be excessive as to the employer, and invariably a large share of the amount recovered goes into costs of litigation and attorney's fees, instead of to the sufferer. Claimants being poor, litigation is frequently financed by attorneys as a matter of charity or speculation, amounting to a burden or degradation respectively to the legal profession. Against this, most compensation acts provide a speedy and inexpensive trial before an administrative tribunal without a jury, with informal procedure. Litigation is speedy, inexpensive, and non-technical. The recovery against the employer is sharply limited in amount and almost the entire amount recovered goes to the employee without diversion to expense of litigation. The amount recovered is received by the employee while there is yet time for him to use it for support during his period of disablement, instead of being recovered in a lump sum years after the economic crisis has passed.

The legislative declaration of superiority of the compensation system over the negligence and damage suit system of redressing industrial injuries has been judicially sanctioned

on many occasions, the following brief extracts being given by way of illustration:

> "Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services and for these is to receive wages, and ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power—a loss of that which stands to the employee as his capital in trade. There is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and

payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale." *New York Central Railroad Company vs. White,* 243 U. S., 188.

"It seems to us that the considerations to which we have adverted in New York C. R. Co. *vs.* White, *supra,* as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through State agencies. Certainly the operation of industrial establishments that, in the ordinary course of things, frequently and inevitably produce disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the

widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of State power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case the Supreme Court of Washington said: 'Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises.' Stertz *vs.* Industrial Ins. Commission, 91 Wash., 588; 158 Pac., 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the 14th Amendment." *Mountain Timber Company vs. State of Washington*, 243 U. S., 219.

To secure compensation insurance benefits to maritime workers, Congress had in 1917 and still has the choice of enacting a uniform national compensation act or of permitting the State compensation acts to apply either for the time being or indefinitely. The question of which of these courses to adopt is a legislative one, depending upon varying political and economic considerations. So long as either course is constitutional, the question of which to adopt is one solely

within the power of Congress. A few of the arguments in favor of relinquishing the matter to the States, as Congress has done, are:

1. *Local Burden.* The burden cast by industrial injury in the maritime field is primarily a local affair, justifying the granting of power to the States to protect themselves against loss on account thereof. This has been discussed above.

2. *Necessity for Quick Action.* The Jensen case, decided in June, 1917, left dock workers, stevedores, and other maritime workers without the protection of compensation benefits to which they had previously been accustomed. The time was one of feverish activity incident to the war and increased demands upon transportation by land and sea. Accidents were more numerous because of the rush of such work. Admiralty law gave no protection to maritime workers comparable with the benefits of State compensation acts. The great mass of workmen in the same community in nonmaritime occupations were enjoying the protection denied to stevedores and dock workers, causing intense dissatisfaction among the latter. Labor troubles were acute and waterfront strikes threatening. With a discontented labor force (justly with respect to the demand for compensation protection), and tendencies toward labor troubles, there was danger that transportation service would be hampered at a critical time. It was therefore wise for the Government to respond speedily to the insistent demands of maritime workers for compensation protection of some sort. As it would take months or years to get a complete national compensation system through Congress and get an efficient administration of it to working, and as the maritime States already had such laws with proper machinery in full operation, the reestablishment of State compensation acts was clearly the best means of meeting the emergency.

3. *Existing Laws and Organization at Hand.* As above pointed out, the maritime States were at that time fully

equipped as to laws and administrative machinery to take over the work without a moment's delay.

4. *Uniformity.* The advantage of compensating stevedores, dock workers, and river and harbor boatmen, according to the law of the State in which they had their residence and employment, upon the same basis and before the same tribunals as of other workers in the same State, is worthy of consideration. Uniformity of relief among industrial workers makes for greater labor contentment and efficiency of production. The avoidance of dual tribunals, in which a claimant may frequently find he has sued in the wrong tribunal, whichever one he chooses, is very necessary.

II. Brief of the Argument.

The text of the act of Congress under attack will be found in Appendix A of this brief. The construction of this act by the Senate Judiciary Committee in its report submitting the bill will be found in Appendix B.

The act of Congress here under consideration specifically saves both *rights* and *remedies* under the State compensation acts. Constitutional questions are therefore presented under two heads:

(*a*) *Judicial, i. e.,* whether any conflict is created between the judicial power of the States and the judicial power of the United States in respect to maritime injuries.

(*b*) *Legislative, i. e.,* whether any conflict is created between the legislative power of the States and the legislative power of the United States in respect to maritime injuries.

A. *No unconstitutional interference is created by the Johnson Amendment between the judicial power of the States and of the United States.*

By article 3, section 2 of the Federal Constitution the power of the United States is extended to "all cases of admiralty and maritime jurisdiction." This grant is a simple investiture, permitting concurrent jurisdiction of the State courts unless Congress expressly or impliedly makes the Federal jurisdiction exclusive.

Congress may *a fortiori* expressly permit the States to exercise concurrent judicial jurisdiction. This is proved by the unchallenged existence of the older "saving clause," sections 24, 256 Judicial Code, for one hundred and thirty years, which permits exactly this thing.

Practically every judicial power granted by Article III, section 2, with the exception of impeachments of Federal officers, made exclusive by Article I, section 3, subdivision 6, is capable of concurrent exercise by State courts unless Congress prescribes otherwise. For instance, questions arising under the Constitution, laws and treaties of the United States can and are determined in State courts, with a right of review in the United States Supreme Court. Ambassadors, ministers and consuls may institute proceedings in State or Federal courts. The United States and the States may institute proceedings under their corporate powers in State courts if they desire. Cases involving diversity of citizenship may be tried in either forum.

Moreover, in view of the recent decision in *The Howell*, 257 Fed., 578, further discussed *infra*, it is proper to observe that Congress may, if it chooses, decline to exercise a portion of the judicial power of the United States, leaving the State court the exclusive forum for the time being. Under the power given it to constitute tribunals inferior to a Supreme Court, Congress may omit to constitute a Federal court having jurisdiction over certain matters. For instance, it has been established that it may limit jurisdiction of the Federal courts under diversity of citizenship to cases involving more than $2,000, although the Constitution vests judicial power

in the United States for diversity of citizenship without regard to amount.

Holt vs. Indiana Mfg. Co., 176 U. S., 68.
United States vs. Hayward, 160 U. S., 493, at 498.
Fishback vs. Western Union Telegraph Co., 161 U. S., 96.

Similarly, Congress may omit to confer jurisdiction over certain maritime transactions upon the Federal courts.

Congress may reach the same result in another way. It may repeal or alter the maritime substantive law so that there would no longer be a right of action under the maritime law for maritime injuries. (*The Howell,* 257 Fed., 578.) In such case there is no right to be asserted under the law maritime and no infringement of Article III, section 2 would exist if injuries of maritime employees were triable solely in State courts under State law.

Congress may therefore authorize the exercise of concurrent judicial powers by the States with respect to maritime injuries.

B. *No unconstitutional interference is created by the Johnson Amendment between the legislative power of the States and of the United States.*

The same holds true of Article I, section 8, of the Constitution as of Article III, section 2. The grant of power to the United States, with a few minor exceptions, is a simple investiture and does not make mandatory its exclusive exercise by the United States. A study of Article I of the Constitution shows that certain powers are expressly prohibited to the States (Art. I, sec. 10, subd. 1). Others are permitted to the States with the express consent of Congress (Art. I, sec. 10, subds. 2 and 3). Of the remainder (Art. I, sec. 8), a few deal with matters of organization and internal functioning of the Federal Government as a sovereignty, and on

recognized principles of sovereignty could be exercised only by it. These are (1) to borrow money on the credit of the United States, (2) to constitute tribunals inferior to the Supreme Court, (3) to exercise exclusive jurisdiction over the District of Columbia.

The remainder of the powers conferred by Article I, sec. 8 have to do with the power to make or alter substantive private law, and undoubtedly are capable of concurrent exercise by the States with the consent, or in the absence of implied objection, of the United States. For instance, under the power to regulate commerce the States, until the enactment of the Federal Employees' Liability Act, supplied the entire body of law relating to injuries sustained by employees of railroads while engaged in interstate commerce. Similarly, under the bankruptcy clause, States may enact laws where not in conflict with an act of Congress.

Sturges vs. Crowninshield, 4 Wheaton, 122.

The power of Congress to legislate upon admiralty and maritime subjects is derived by implication from the grant of judicial power to the United States in this matter (Art. III, sec. 2) and also from Article I, section 8, subdivision 18, which confers power upon Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." *Southern Pacific Company vs. Jensen, supra.*

That this power is susceptible of concurrent exercise by the States, at least with the express consent of Congress, is established by the following, here submitted in outline only and presented more fully below:

1. Authorities sanctioning State legislation in the maritime field, which can be explained only upon the theory that the States may be given power to legislate in this field.

2. The unchallenged existence of the saving clause for one hundred thirty years, by which clause Congress permits certain State legislation in maritime matters.

3. The decision of this court in *Southern Pacific Co. vs. Jensen,* by its discussion of the "saving clause," and its elaboration of the rule that in matters involving necessity for uniformity "the inaction of Congress is deemed equivalent to its declaration that commerce in that matter shall be free," recognizes the power of Congress to affirmatively, in whole or in part, relinquish portions of the field to the States.

4. The decision of this court in *The Lottawanna,* 21 Wall., 558, establishes the power of Congress to legislate on seaman's rights under the commerce clause, and also establishes the right of the States to legislate in such matters until Congress shall indicate otherwise.

5. The close parallel between the power to legislate under the commerce clause concerning injuries sustained by employees in interstate commerce, and under the implied grant of power over maritime law to legislate concerning injuries sustained by employees in maritime employments, is directly in point. If the States may exercise such power for interstate injuries under the silence of Congress, they can exercise similar power over maritime injuries with the express assent of Congress.

6. The close parallel between the Johnson Amendment and the Wilson and Webb-Kenyon Acts, relinquishing to the State a portion of the Federal legislative field, is directly in point. The latter having been held constitutional, the former must be.

7. Finally, the burden cast by industrial injuries, whether maritime or non-maritime, is a local burden and the redress

of such injuries is within the police power of the States. *New York Central Railroad Co. vs. White,* 243 U. S., 188. The State can therefore legislate upon the subject in its own right, subject only to the barrier of Federal occupation of all or a portion of the field, which barrier Congress may let down.

C. *Neither the New York Act nor the Johnson Amendment violate the commerce clause* (Art. 1, sec. 8, subd. 3).

Plaintiff in error claims in his assignment of errors and brief, but makes no effort to prove, that the award in the present case is barred by the commerce clause. A moment's reflection shows that this claim is unsound.

1. Under the commerce clause the States have had full authority to legislate concerning injuries sustained by employees in interstate commerce (typically railroad employees) until Congress acts. *The Lottawanna,* 121 Wall., 558. The enactment of the Federal Employers' Liability Act excludes State legislation to the extent that such act governs, but no more. *New York Central Railroad vs. Winfield,* 244 U. S., 147. Until the passage of the Federal law, State legislation in the field was of unquestioned validity.

2. Congress has never acted under the commerce clause or otherwise for injuries in interstate commerce by water, the Federal Employers' Liability Act being limited to employees of carriers by rail.

3. Congress has power to return to the State jurisdiction over a portion of interstate commerce otherwise exclusively Federal.

In re Rahrer, 140 U. S., 545.

Clark Distilling Co. vs. Western Md. R. Co., 242 U. S., 311.

The Lottawanna, 21 Wall., 558.

4. The deceased employee in the case at bar was not engaged in interstate or foreign commerce of any sort. Plaintiff in error, not being affected, is therefore not privileged to raise the point.

D. *The award of compensation benefits in the persent case is sustainable, without regard to the Johnson Amendment, by the following special constitutional considerations of limited application:*

1. The present case is one of fatal injury. The law maritime makes no provision for fatal injuries, which are redressed only by State statutes. The law maritime being silent, State compensation acts for fatal injuries do not conflict with the law maritime.

2. The present case is one of an injury occurring upon the wharf or dock. The test of admiralty jurisdiction in tort is locality, and a tort occurring upon the dock is non-maritime. Therefore, State compensation acts can regulate it without conflicting with the law maritime.

To clear the present case of possible adventitious factors, it is respectfully pointed out:

1. No question is here presented of injuries occurring outside of the territorial limits of the State.

2. The deceased employee in the present case was not engaged in interstate or foreign commerce. He was engaged solely in intrastate commerce, in transporting ice from upper New York to New York City.

3. No question is here presented of attempt by a State to encroach upon modes of relief peculiarly appropriate to tribunals enforcing the law maritime, such as a libel *in rem* to enforce a maritime lien. The procedure below was strictly *in personam*.

PART II.

POINTS AND AUTHORITIES.

I. No Unconstitutional Interference is Created by the Johnson Amendment Between the Judicial Powers of the National Government and of the States.

But little more need be said in support of this proposition. We desire to call the attention of the court, however, to the following:

A. The existence of the "saving clause" in sections 24 and 256 of the Judicial Code and in the corresponding sections of the prior Judiciary Act, regarded as constitutional for over one hundred years, is conclusive proof of the power of Congress to permit a concurrent judicial power in the State in maritime matters, in a field in which Congress may exclude the State entirely if it so desires.

B. The grant of exclusive jurisdiction to the Federal courts in maritime matters is statutory, not constitutional.

The only authoritative reference to exclusive jurisdiction in maritime matters is found in section 9 of the Judiciary Act of 1789 and its successors in later statutes vesting *exclusive* jurisdiction in such cases in the United States courts, but *saving* the concurrent jurisdiction of the State courts.

Because of the many years of operation under the Judiciary Act, the fact is sometimes lost sight of that the source of *exclusive* jurisdiction in the Federal courts is the Judiciary Act and not the Constitution. The latter merely permits Congress to make such jurisdiction exclusive, if it so desires.

C. *Authorities:*

In *United States vs. Union Pacific Railroad Co.*, 98 U. S., 569, at 603,

this court stated:

> "We say, however, that with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States is unlimited by the Constitution."

In

Cooley, General Principles of Constitutional Law, 3rd ed., p. 124,

the following appears:

> "But although the Constitution extends the power to the cases specified (Const. Art. III, sec. 2), it does not make complete provision for its exercise, except in the few cases of which the Supreme Court is authorized to take original cognizance. For other cases it is necessary that courts shall be created by Congress and their respective jurisdictions defined; and in creating them, Congress may confer upon each so much of the judicial power of the United States as to its wisdom shall seem proper and suitable, and may restrict that which is conferred at discretion. In doing so, it may apportion among the several Federal courts all the judicial power of the United States, or it may apportion a part only, and in that case what is not apportioned will be left to be exercised by the courts of the States. Thus the States may have a limited jurisdiction within the sphere of the judicial power of the United States, but subject to be further limited or wholly taken away by subsequent Federal legislation. (Citing *Robertson vs. Cease,* 97 U. S., 646; *Godfrey vs. Terry,* 97 U. S., 171.) Such is the state of the law at this time: many cases within the judicial power of the United States are left wholly to the State courts, while in many others the State

> courts are permitted to exercise a jurisdiction concurrent with that of the Federal courts, but with a final review of the judgments on questions of Federal law in the United States Supreme Court."

II. No Conflict is Created Between the Legislative Power of the United States and of the States with Respect to Maritime Injuries.

This proposition goes to the root of the entire question. If it be sound, the act of Congress under consideration is constitutional, for no other consideration can affect the issue. No question of delegation of legislative power can be raised, for Congress is not authorizing State legislatures to enact Federal law; it is, instead, widening a field of State activity in which the State acts in its own right, not in right of Congress. State compensation acts derive their constitutional authority from and are referable to the police power of the States. *New York Central Railroad vs. White, supra.*

Similarly, if this proposition be correct, the doctrine of uniformity of maritime law (if uniformity of application be required of an act of Congress) becomes unimportant. Excellent as the doctrine of uniformity may be, as laid down in Southern Pacific Co. *vs.* Jensen, with reference to the general maritime law to secure it against interference from unauthorized State statutes, the moment the Federal Government permits the States to enter the field of maritime injuries, it necessarily follows that each State will enter with its own laws.

That our main proposition is correct and that the field at maritime injuries is one susceptible of the exercise of concurrent legislative power by the States, with the consent of Congress, is established by the following authorities and quotations therefrom:

> "Article 3, § 2, of the Constitution, extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction;' and article 1,

§ 8, confers upon the Congress power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof.' Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has *paramount power to fix and determine the maritime law* which shall prevail throughout the country. *Butler vs. Boston & S. S. Co.*, 130 U. S., 527; 32 L. Ed., 1017; 9 Sup. Ct. Rep., 612; *Re Garnett*, 141 U. S., 1, 14; 35 L. Ed., 631, 634; 11 Sup. Ct. Rep., 840." "And further, that *in the absence of some controlling statute*, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna* (*Rodd vs. Heartt*), 21 Wall., 558; 22 L. Ed., 654; *Butler vs. Boston & S. S. Co.*, 130 U. S., 527, 557; 32 L. Ed., 1017, 1024; 9 Sup. Ct. Rep., 612; *Workman vs. New York*, 179 U. S., 552; 45 L. Ed., 314; 21 Sup. Ct. Rep., 212." * * *

"By § 9, Judiciary Act of 1789 (1 Stat. at L., 76, 77, chap. 20), the district courts of the United States were given *'exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * *saving to suitors, in all cases, the right of a common-law remedy*, where the common law is competent to give it.' And this grant has been continued. Judicial Code, § § 24 and 256 (36 Stat. at L., 1091, 1160, chap. 231, Comp. Stat., 1916 § § 991 (1), 1233).

"In view of these constitutional provisions and the Federal act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. *That this may be done to some extent cannot be denied.* A lien upon a vessel for repairs in her own port may be given by State statute. (*The Lottawanna* (*Rodd vs. Heartt*), 21 Wall., 558, 579, 580; 22 L. Ed., 654, 663, 664; *The J. E. Rumbell*, 148 U. S., 1; 37 L. Ed., 345; 13 Sup. Ct. Rep., 498); pilotage fees fixed (*Cooley vs. Port Wardens*, 12 How.,

299; 13 L. Ed., 996; *Ex parte McNeil*, 13 Wall., 236, 242; 20 L. Ed., 624, 626); and the right given to recover in death cases (*The Hamilton (Old Dominion S. S. Co. vs. Gilmore)*, 207 U. S., 398; 52 L. Ed., 264; 28 Sup. Ct. Rep., 133; *La Bourgogne (Deslions vs. La Compagnie Generale Transatlantique)*, 210 U. S., 95, 138; 52 L. Ed., 973, 993; 28 Sup. Ct. Rep., 664). *See The City of Norwalk*, 55 Fed., 98, 106. Equally well established is the rule that State statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty (*The Moses Taylor*, 4 Wall., 411; 18 L. Ed., 397; *American S. B. Co. vs. Chase*, 16 Wall., 522, 534; 21 L. Ed., 369, 372; *The Glide*, 167 U. S., 606; 42 L. Ed., 296; 17 Sup. Ct. Rep., 930); nor create liens for materials used in repairing a foreign ship (*The Roanoke*, 189 U. S., 185; 47 L. Ed., 770; 23 Sup. Ct. Rep., 491). See *Workman vs. New York*, 179 U. S., 552; 45 L. Ed., 314; 21 Sup. Ct. Rep., 212. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the *general maritime law*, or interferes with the proper harmony and uniformity of *that* law in *its* international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which *such law* was incorporated into our *national laws* by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*." *Southern Pacific vs. Jensen*, majority opinion (Italics ours).

"There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the State courts, and leaves some power of legislation, at least, to the States. For the latter I need do no more than refer to State pilotage statutes, and to liens created by State laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the State courts, although the death

was due to a collision upon the high seas. *American S. B. Co. vs. Chase*, 16 Wall., 522; 21 L. Ed., 369; *Sherlock vs. Alling*, 93 U. S., 99, 104; 23 L. Ed., 819, 820; *Knapp, S. & Co. vs. McCaffrey*, 177 U. S., 638, 646; 44 L. Ed., 921, 925; 20 Sup. Ct. Rep., 824; *Minnesota Rate Cases (Simpson vs. Sheppard)*, 230 U. S., 352, 409; 57 L. Ed., 1511, 1545; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann. Cas. 1916 A, 18." *Southern Pacific Co. vs. Jensen*, dissenting opinion of Justice Holmes.

"In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the first Congress (Act of August 7, 1789, chap. 9, § 4, 1 Stat. at L., 53, 54; Rev. Stat., § 4235; Comp. Stat., 1916, § 7981), and this court, in many decisions, has sustained local regulations of that character (*Cooley vs. Port Wardens*, 12 How., 299, 320; 13 L. Ed., 996, 1005; *Pacific Mail S. S. Co. vs. Joliffe*, 2 Wall., 450, 459; 17 L. Ed., 805, 807; *Ex parte McNiel*, 13 Wall., 236, 241; 20 L. Ed., 624, 626; *Wilson vs. McNamee*, 102 U. S., 572; 26 L. Ed., 234; *Olsen vs. Smith*, 195 U. S., 332, 341; 49 L. Ed., 224, 229; 25 Sup. Ct. Rep., 52; *Anderson vs. Pacific Coast S. S. Co.*, 225 U. S., 187, 195; 56 L. Ed., 1047, 1051; 32 Sup. Ct. Rep., 625)."

"It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Wilson vs. Black Bird Creek Marsh Co.*, 2 Pet., 245, 252; 7 L. Ed., 412, 414; *Gilman vs. Philadelphia*, 3 Wall., 713; 18 L. Ed., 96; *Pound vs. Turck*, 95 U. S., 459; 24 L. Ed., 525; *Escanaba & L. M. Transp. Co. vs. Chicago*, 107 U. S., 678, 683; 27 L. Ed., 442, 445; 2 Sup. Ct. Rep., 185; *Cardwell vs. American River Bridge Co.*, 113 U. S., 205, 208; 28 L. Ed., 959, 960; 5 Sup. Ct. Rep., 423; *Hamilton vs. Vicksburg, S. & P. R. Co.*, 119 U. S.,

280; 30 L. Ed., 393; 7 Sup. Ct. Rep., 206; *Willamette Iron Bridge Co. vs. Hatch*, 125 U. S., 1, 8; 31 L. Ed., 629, 631; 8 Sup. Ct. Rep., 811; *Lake Shore & M. S. R. Co. vs. Ohio*, 165 U. S., 365; 41 L. Ed., 747; 17 Sup. Ct. Rep., 357; *Manigault vs. Springs*, 199 U. S., 473, 478; 50 L. Ed., 274, 277; 26 Sup. Ct. Rep., 127."

"So, as to harbor improvements (*Mobile County vs. Kimball*, 102 U. S., 691, 697; 26 L. Ed., 238, 239); improvements and obstructions to navigation (*Huse vs. Glover*, 119 U. S., 543, 548; 30 L. Ed., 487, 490; 7 Sup. Ct. Rep., 313; *Leovy vs. United States*, 177 U. S., 621, 625; 44 L. Ed., 914, 916; 20 Sup. Ct. Rep., 797; *Cummings vs. Chicago*, 188 U. S., 410, 427; 47 L. Ed., 525, 530; 23 Sup. Ct. Rep., 472); inspection and quarantine laws (Gibbons *vs.* Ogden, 9 Wheat., 1, 203; 6 L. Ed., 23, 71); wharfage charges (*Keokuk Northern Line Packet Co. vs. Keokuk*, 95 U. S., 80; 24 L. Ed., 377; *Cincinnati, P. B. S. & P. Packet Co. vs. Cattlesburg*, 105 U. S., 559, 563; 26 L. Ed., 1169, 1171; *Parkersburg & O. River Transp. Co. vs. Parkersburg*, 107 U. S., 691, 702; 27 L. Ed., 584, 588; 2 Sup. Ct. Rep., 732; *Ouachita & M. River Packet Co. vs. Aiken*, 121 U. S., 444, 447; 30 L. Ed., 976, 977; 1 Inters. Com. Rep., 379; 7 Sup. Ct. Rep., 907); tolls for the use of an improved waterway (*Sands vs. Manistee River Improv. Co.*, 123 U. S., 288, 295; 31 L. Ed., 149, 151; 8 Sup. Ct. Rep., 113).

"Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S., 199; 30 L. Ed., 358; 7 Sup. Ct. Rep., 140; *The Alaska*, 130 U. S., 201, 209; 32 L. Ed., 923, 925; 9 Sup. Ct. Rep., 461), yet a right of action created by statute is enforceable in a State court although the tort was committed upon navigable water (*American S. B. Co. vs. Chase*, 16 Wall., 522, 533; 21 L. Ed., 369; 372; *Sherlock vs. Alling*, 93 U. S., 99, 104; 23 L. Ed., 819, 820), and the liability arising out of a State statute in such a case will be recognized and enforced in the admiralty (*The Hamilton* (*Old Dominion S. S. Co. vs. Gilmore*), 207 U. S., 398; 52 L. Ed.,

> 264; 28 Sup. Ct. Rep., 133), although not by proceeding *in rem* unless the statute expressly creates a lien (*The Corsair* (*Barton vs. Brown*), 145 U. S., 335, 347; 36 L. Ed., 727, 731; 12 Sup. Ct. Rep., 949)."
>
> *Southern Pacific Co. vs. Jensen,* dissenting opinion of Mr. Justice Pitney.

Both the prevailing and dissenting opinions in Southern Pacific Co. vs. Jensen therefore recognize that the field of maritime injuries is one susceptible of concurrent legislative power of the States, provided only (as to the prevailing opinion) that the permission of Congress for the exercise of such power be evidenced.

Independently of the Jensen case, such power of Congress in maritime matters has been recognized by this court.

In *The Hope,* 10 Peters, 108, Mr. Justice Story, speaking of the adoption of State pilotage laws by Congress, spoke as follows:

> "The jurisdiction of a District Court of the United States, in cases of admiralty and maritime jurisdiction, is not ousted by the adoption of the State laws by the act of Congress. The only effect is to leave the jurisdiction concurrent in the State courts; and if the party should sue in the admiralty, to limit his recovery to a precise sum to which he would be entitled under the State laws adopted by Congress, if he should sue in the State courts."

In a similar field of Federal power this court spoke as follows, in *Sturges vs. Crowninshield,* 4 Wheat., 122, at 196:

> "If, in the opinion of Congress, uniform laws governing bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the

> States. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished. It can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States, but it removes the disability to its exercise which was created by the act of Congress."

The following is quoted from Cooley, General Principles of Constitutional Law, 3d Ed., page 35:

> "The mere grant of a power to Congress does not of itself necessarily imply a prohibition upon the States to exercise a like power. The full sphere of Federal powers may, at the discretion of Congress, be occupied or not, as the wisdom of that body may determine. If not fully occupied, the States may in some instances legislate within the same sphere, subject, however to any subsequent legislation that Congress may adopt. It is not the mere grant of a national power but its exercise which is incompatible with the exercise of the same power by the States."

Finally, the very existence of the saving clause for one hundred thirty years under which State statutes have been enforced constantly in maritime matters, both in the admiralty and in State courts, fully establishes the contention.

III. Discussion of Southern Pacific Co. vs. Jensen.

The attack upon the constitutionality of the Johnson Amendment is predicated almost entirely upon the Jensen decision.

The Jensen case does not support the contentions made for it, for the following reasons:

A. The actual *ratio decidendi* of the Jensen decision support, rather than oppose, the validity of the act of Congress.

The *ratio decidendi* of the case are:

1. The silence of Congress with respect to State participation in maritime matters is deemed equivalent, in view of the necessity for uniformity, to a declaration by Congress that the field shall remain free from State interference.

2. The former saving clause, extending a certain concurrent power to the States, does not include compensation acts, which are of a character unknown to the common law.

It follows from the first proposition above that Congress has power to make a declaration either for or against concurrent power by the State, else its presumed intent, deduced from its silence, would be immaterial. If Congress were powerless to authorize State participation, the Vance, Bowman, and Clark Distilling Co. cases, cited in the excerpts, *supra*, from the Jensen case, would be entirely irrelevant.

It follows from the second proposition that Congress has power to include workmen's compensation acts in the saving clause, else inquiry by this court into whether they were so included would have been without point.

B. The court is speaking in the Jensen case, not of the power of Congress over maritime matters, but of the supremacy of the general (non-statutory) maritime law over State legislation unauthorized by Congress. The consideration of uniformity is held important only to assist in drawing the conclusion that the silence of Congress is equivalent to its express declaration reserving the entire field to the Federal Government. It is not stated or intended to be applied to an act of Congress, as none was before the court.

Stated in another way, the New York compensation act failed in the Jensen case, not because it was in direct violation of article 3, section 2, of the Constitution, but because the State of New York had attempted to enter a field which the Constitution authorized the Federal Government to occupy, concurrently or exclusively, and which the Federal

Government had impliedly elected to fully occupy. *A rule of law prohibiting trespassing upon a person's property in his absence and without his consent cannot by any form of logic be held to include, by implication, the prohibition of the owner's bringing guests onto the property with his express invitation.* Yet this is the construction plaintiff in error seeks to put upon the Jensen case.

It should be noted that the maritime law is not stated in the decision to be incorporated into the Constitution. The Constitution makes no body of law, common law, equity, admiralty, or international law, of constitutional rank and superior to the control of Congress. The general maritime law is, instead, stated to have been incorporated into the *national laws,* and hence subject to the power of Congress to the same extent as its statutes.

C. The reference in the Jensen case to the grant to Congress of power to regulate commerce is conclusive of the constitutionality of the Johnson Amendment. In the Jensen case the majority of the court spoke as follows:

> "A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it, is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman vs. Chicago & N. W. R. Co.*, 125 U. S., 465, 507, 598; 31 L. Ed., 700, 714, 715; 1 Inters. Com. Rep., 823; 8 Sup. Ct. Rep., 689, 1062; *Vance vs. W. A. Vandercook Co.*, 170 U. S., 438, 444; 42 L. Ed., 1100, 1103; 18 Sup. Ct. Rep., 674; *Clark Distilling Co. vs. Western Maryland R. Co.*, 242 U. S., 311, *ante*, 180; L. R. A., 1917B, 1218; 37 Sup. Ct. Rep., 180, decided January 8, 1917. *And the same character of reasoning*

> *which supports this rule, we think, makes imperative the stated limitation* upon the power of the States to interpose where maritime matters are involved."

By the above excerpt the court places the power of the States to regulate the movement of articles in interstate commerce, and to regulate maritime injuries, upon exactly the same footing. A brief review of the subject-matter of the three cases cited with reference to interstate commerce is therefore in order.

In the *Bowman* case, above cited, and later in *Leisy vs. Hardin*, 135 U. S., 100, the court enunciated the "original package" doctrine. This doctrine is that intoxicating liquors being shipped from one State to another are immune from State prohibitory laws after importation into a State and until they are mingled with the general body of goods within the State by sale or breaking up of the original package. In the *Bowman* case, however, the power of Congress is recognized to expand State powers, the following being quoted from the syllabus:

> "A State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, *unless the consent of Congress, express or implied, is first obtained.*" (Italics ours.)

In *Leisy vs. Hardin, supra*, the court held that the power of Congress to regulate interstate commerce with respect to intoxicating liquors was exclusive, and that the absence of any law of Congress was equivalent to its declaration that the States should not interfere. *But the court also stated in that case that Congress could place such subject-matter within the jurisdiction of the States, by affirmative action.*

Following *Leisy vs. Hardin*, and to overcome its effect, Congress in 1890 enacted the Wilson act (26 Stat., 313, c. 728), in which it was declared that intoxicating liquors in

interstate commerce should become subject to State laws immediately upon importation, without waiting for sale or the breaking up of the original package. This law was declared constitutional in *In re Rahrer*, 140 U. S., 545, notwithstanding the contentions there made that the act amounted to a delegation of Federal legislative power to the States, and disregarded the uniformity desired by the Constitution to be secured by Federal control of interstate commerce.

In the *Vance* case, also quoted in the Jensen case, the constitutionality of the Wilson act was expressly upheld against these contentions.

As the Wilson act failed to completely vest in the States the power to prohibit importation of intoxicating liquors, it was eventually superseded by the Webb-Kenyon act (37 Stat., 699, c. 90). This act prohibits all importation of intoxicating liquors into States whose laws prohibit such importation. Its effect is indicated by a portion of its title: "An act to divest intoxicating liquors of their interstate character in certain cases." By this act Congress has affirmatively removed all barriers arising under the commerce clause of the Federal Constitution, against the power of the States to prevent importation of alcoholic liquors.

The constitutionality of the Webb-Kenyon act was upheld by this court in the *Clark Distilling Co.* case, also cited in the Jensen case.

The fact that in all three of the cases cited in the prevailing opinion in the Jensen case, the power of Congress to affirmatively extend the power of the States is specifically upheld, indicates that the court in the Jensen case believed Congress to have such power with respect to maritime injuries, as it held the same character of reasoning to be applicable in both cases.

If it be urged that the constitutionality of the Webb-Kenyon act depends solely upon the peculiar character of the article of commerce regulated, *i. e.*, intoxicating liquors,

and that such holding is not an authority for any other case involving the relinquishment to the States of a portion of Federal jurisdiction, the answer is twofold:

(1.) The power of Congress necessarily depends upon general rules. This court cannot legislate exceptions based upon specific articles of commerce. The decision must therefore stand upon the proposition that Congress has power to relinquish to the States in its discretion any portion of the field of regulation of interstate commerce in which the State is directly interested as a matter of self-protection.

(2.) Alcoholic liquors and industrial injuries are in the same class in any event for the purpose of prevention and redress by State statutes, as both affect the social welfare of the State by rendering a certain portion of its residents economic liabilities instead of economic assets, and tending to make such residents and their families a burden upon State charities and institutions. The redress of both is within the police power of the State as a matter of self-protection.

D. Deceased was not employed in interstate or foreign commerce by water, and the reasoning of the Jensen case fails.

In the Jensen case this court stated as follows:

> "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character *affecting the intercourse of the States with each other or with foreign States.*" * * *
>
> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law *in its international and interstate relations.*" * * *

> "A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it, is now fi[illegible]ly established. 'Where the subject is *national* in its character, and admits and requires uniformity [illegible] regulation, affecting alike all the States, *such as* [illegible]*nsportation between the States, including the impor[illegible]ation of goods from one State to another*, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Southern Pacific Co. vs. Jensen.* (Italics ours.)

In the Jensen case the employee was injured while loading a vessel engaged in interstate comme[illegible]. In the case at bar deceased was employed [illegible]out a barge employed solely in intrastate transportation within the State of New York and in no wise affecting interstate or foreign commerce. The considerations which prevailed upon the court in that case to exclude New York from the power to protect its own citizens against injury in the operation of its own industries do not apply here.

IV. The Commerce Clause, Herein Discussing the Lottawanna.

Reference was made in the Jensen case, and also in plaintiff in error's brief in the present case, to *The Lottawanna*, and counsel endeavors to set up this case as an authority in support of his contentions. It is therefore advisable to study the decision of the court in *The Lottawanna* carefully. Upon so doing it is noted that while some portions of the dicta contained in that case tend to support counsel's contentions, the points actually decided are to the opposite effect and render the case a strong one in support of our contentions.

The Lottawanna establishes the following fundamental principles:

1. The general maritime law of the United States is not the general maritime law of the world, but only such portions thereof with local changes as constitute the *received* law of the United States.

2. Congress has power under the commerce clause to amend the maritime law with respect to the rights of seamen and redress of injuries sustained by them.

3. Congress has power under the commerce clause to permit State legislation to alter the law maritime.

4. A lien created by State statute for supplies furnished a vessel in her home port is enforceable as part of the maritime law.

In support of these contentions it is necessary only to quote the following from Mr. Justice Bradley's opinion:

From page 576:

> "But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it." * * *

From page 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. * * * Under it Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; * * * *the rights and duties of seamen; the limitations of the responsibility of ship-owners for the negligence and misconduct of their captains and crews;* and many other things of a character truly maritime." * * *

From page 579:

> "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation." * * *

From page 581:

> "But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. * * *
>
> "It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.
>
> "Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of the State laws."

It is submitted that the above excerpts from *The Lottawanna* support the constitutionality of the Johnson Amendment in that they establish the power of Congress to permit State legislation concerning matters of maritime commerce.

V. Uniformity of Maritime Law.

Plaintiff in error claims that necessity for uniformity of maritime law is constitutionally mandatory so as to constitute a limitation upon the power of Congress. Plaintiff's authorities, we have just shown, do not support this proposition.

Further, if our main contention in this brief is correct,

that Congress has authority to permit concurrent jurisdiction of the States in maritime matters to any extent deemed wise by it, no question of uniformity can arise, as each State necessarily acts under its own laws.

Taking a more general view of the matter of uniformity the following is submitted:

A. If the act be considered not to be of uniform application, it still violates no constitutional requirement. The Constitution does not require acts of Congress to be uniform except in a few cases specifically mentioned. Quoting from article 1, section 8:

> "1. The Congress shall have power to lay and collect taxes, duties * * *; but all taxes, imposts, and excises shall be uniform throughout the United States.
>
> "4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

Quoting from article 1, section 9, subdivision 4:

> "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The maxim, *inclusio unius exclusio alterius*, as well as sound logic, indicates that the Constitution does not require uniformity of acts of Congress in respect to the other powers granted. It will be noted that the Federal Constitution does not contain the requirement common to most State constitutions, that statutes shall be of a general or uniform operation, and prohibiting special or class legislation.

This court has, however, passed squarely upon the matter. In *U. S. vs. Union Pacific R. R. Co.*, 98 U. S., 569, at 603, it is held:

> "We say, therefore that with the exception of the Supreme Court, the authority of Congress, in creat-

> ing courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution."

The Lottawanna, 21 Wall., 558, does not hold, as claimed, that an act of Congress must be of uniform application. No act of Congress was there under consideration. On the contrary, like in *Re Rahrer, supra*, it upholds State legislation where not in conflict with an act of Congress.

B. The Johnson Amendment is in its last analysis of uniform application throughout the country.

In *In re Rahrer*, 140 U. S., 545, this court held the Wilson act, which similarly surrendered certain matters to the concurrent jurisdiction of the different States, to be of uniform application. Concerning the matter of uniformity this court said:

> "It (Congress) has taken its own course and made its own regulation, applying to those objects of interstate commerce one common rule, whose uniformity is not affected by violations of State laws dealing with such property."

C. In any event, it is respectfully submitted that the desire for uniformity is satisfied by the establishment of the principle in the Jensen case that no State law, except those expressly sanctioned therein, can be made applicable to maritime affairs except with the express consent of Congress. Whether Congress desires to exercise the prerogative given it of requiring uniformity against local regulation in all cases, is for it to determine.

VI. Election of Rights and Remedies, Herein Discussing The Howell.

In the report of the Senate Judiciary Committee recommending the adoption of the Johnson Amendment (our Appendix B), its effect was stated to be to give a maritime worker an election of remedies, *i. e.*, either to proceed in admiralty as theretofore or claim benefits under the workmen's compensation act. Under this construction the applicability of the New York compensation act is attacked by plaintiff in error upon the ground that the New York law contemplates that the compensation remedy, where applicable, should be the exclusive remedy. Therefore, the allowance of an alternative remedy by Federal statute constitutes either an amendment of the New York act by Congress or its application under circumstances not contemplated by the New York legislature.

A contrary construction of the act of Congress is given by Judge Learned Hand in *The Howell*, 257 Fed., 578. His interpretation is that in States where the compensation act is made the exclusive remedy, Congress intended to confirm such exclusive operation of the State law and therefore divested maritime workers injured in such States of all redress in admiralty. The result of this interpretation is also attacked by plaintiff in error, upon the ground that neither Congress nor the States can constitutionally deny a maritime worker access to the admiralty courts of the United States for a maritime injury.

Thus counsel seeks to create an inescapable dilemma. Upon close study of the situation, however, the difficulties raised by him disappear with remarkable rapidity.

To begin with, this is not the place to determine whether the construction given the Johnson Amendment by the Senate Judiciary Committee or by Judge Hand is the proper one. No question of interpretation of the amendment is

here involved. The compensation claimant is not here seeking relief in admiralty and does not complain of deprivation of any right in admiralty, and is therefore equally entitled to compensation upon either construction. All that need be established for present purposes is that either construction is free from constitutional difficulty. It is therefore respectfully submitted:

A. *The Senate Judiciary Committee's construction of election of remedies involves no constitutional defects.*

It is absurd upon the facts of the present case to say that the Johnson Amendment amounts to an amendment or alteration of the New York act by Congress or the uncontemplated application of it, for the reason, as shown in plaintiff in error's brief, page 10, that the New York legislature, *subsequent to October 6, 1917,* re-enacted the provisions of the workmen's compensation act including maritime employments, with express reference to the enactment of the Johnson Amendment as its reason therefor. If any amendment of the New York act is necessary, New York has made such amendment.

Further, the existence of a choice of remedies on the part of an injured maritime worker involves no unconstitutional burden on plaintiff in error. The existence of a choice in remedies in a plaintiff is nothing new and such situation has never been declared unconstitutional.

The choice of a Federal or State forum upon the ground of diversity of citizenship frequently involves a difference of substantive law, as in commercial cases, where the State court applies its own rule or decision, and the Federal court applies the general common law prevailing throughout the country, rejecting the law of the particular State. *Swift vs. Tyson,* 16 Pet., 1.

Comparing *The Max Morris,* 137 U. S., 1, with *Beldon vs. Chase,* 150 U. S., 674, the application of different principles

of liability in State and Federal courts is established, but no indication is made that the existence of an election of rights or remedies is invalid.

Similarly, in *Atlee vs. N. W. Union Packet Co.*, 21 Wall., 389, decided by unanimous court in the same term with *The Lottawanna*, it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty, each court was at liberty to adopt its own rule or decision. No intimation is made that the existence of an election of rights or remedies is unconstitutional.

Whether the decisions just referred to have been overruled by recent decisions of this court with respect to the application of different principles in the different courts, need not here be considered. The point is, that while these cases were considered law, no question of constitutionality was raised upon the ground of election of rights and remedies.

Singularly, the present situation is not produced by the act of a single sovereignty creating dual remedies. New York, acting within its police power, enacts the State compensation law, and can cover maritime employments therein with the consent of Congress. The Federal Government provides a general maritime law, and by the Johnson Amendment permits an election between the two. Each system is constitutional alone, and they are constitutional together.

B. *Under the construction of the Johnson Amendment given in The Howell, no constitutional difficulties appear.*

Plaintiff in error claims that a State cannot deprive a maritime worker of recourse to a court of admiralty. Conceding this bald statement, it has no bearing upon the case. We are not here concerned with the power of the *States*, but with the power of *Congress*. As heretofore shown, *Congress* may by express act relinquish the field of maritime injuries wholly or partially to the concurrent jurisdiction of

the States. If Congress so intends, it has the power to relinquish the field wholly, in which case the State law becomes the sole law applicable to the injury. It also has the power to repeal the right of action of a maritime worker under the general maritime law and thereby present a situation under which there is no substantive right in maritime law which can be enforced in an admiralty proceeding. (*The Howell, supra.*) Congress can repeal portions of the *general maritime law* as fully as it can repeal any *statute* enacted by it upon the same subject (*Southern Pacific Co. vs. Jensen* establishing the paramount power of Congress to fix and determine the law maritime).

If the construction given in *The Howell* of the effect of the Johnson Amendment be correct, Congress has in effect legislated that in States in which the workmen's compensation act is an exclusive remedy, the right of action in admiralty of a maritime worker is repealed. This Congress may do.

VII. Decisions Establishing Constitutionality of the Johnson Amendment.

Up to the present time the following decisions have been rendered in lower courts sustaining the constitutionality of the act of Congress here under consideration:

Stewart vs. Knickerbocker Ice Co., 226 N. Y., 302; 123 N. E., 382 (the present case).

Ruddy vs. Morse Dry Dock Co., 176 N. Y. S., 732.

The Howell, 257 Fed., 578.

No decisions have yet been rendered to the contrary effect.

PART III.

CONSIDERATIONS SUPPORTING THE CONSTITUTIONALITY OF THE ALLOWANCE OF WORKMEN'S COMPENSATION BENEFITS IN THE PRESENT CASE UPON SPECIAL AND LIMITED GROUNDS.

If the court sustains the constitutionality of the act of Congress here under consideration, the decision will control the entire field of State workmen's compensation laws in their maritime aspect. By way of supplement merely, and without weakening what has been said before, the writer desires to submit the following special considerations which do not go to the constitutionality of the Johnson Amendment but which, it is believed, sustain the application of the New York act to the present case in view of special factors involved herein.

I. The present case being one of fatal injury, for which the general maritime law makes no provision, no conflict exists and the State law may be applied.

As is well known to the court, the law maritime, like the common law, allows no recovery for tortious injuries resulting in death. *Causa moritur cum persona.* Relief is therefore given in admiralty only by the adoption of State death statutes.

Since the reason for excluding the New York compensation act in the Jensen case was that it came in conflict with the general maritime law, it would seem to follow that where the general maritime law is silent upon an entire division or chapter of its corpus, there should be nothing to prevent the State law from having application. Admiralty having never occupied the field of death cases, the States are not running against any Federal barrier in occupying the field.

Why this court did not so hold in the Jensen case, a death case, I have never been able to understand, particularly since it there recognized the obvious facts that State death statutes are enforceable in maritime cases. If the field is free to the States for negligence statutes, it should be equally free for any other form of relief provided by State law, as all intrude upon the law maritime equally.

The only distinction discernible between death statutes and compensation acts in the Jensen case is that the court considers the former to be within the saving clause of sections 24 and 256 of the Judicial Code, whereas compensation acts were unknown to the common law and not within it. If this be the only distinction, then the Johnson Amendment wipes out all distinction between the two.

II. The Present Case is Not One of Maritime Cognizance, as the Injury Occurred Upon the Land.

The test of maritime jurisdiction in tort is that of locality.

The Plymouth, 70 U. S. (3 Wall.), 20.

A tort occurring upon a wharf, dock or land to a person in maritime employment is not a maritime tort and the admiralty courts have no jurisdiction over it.

The Plymouth, supra.

Keator vs. Rock Plaster Mfg. Co., 256 Fed., 574.

In the present case the injury occurred upon the dock and is therefore non-maritime. It could not have been sued on in admiralty on any other theory than that of tort. Being non-maritime, there is no reason why the State compensation act cannot apply, regardless of the Johnson Amendment.

The view here expressed that where the tort in maritime employment occurs upon the land, the subject is non-maritime and the State compensation acts are therefore free to

operate, is not inconsistent with anything contained in the Jensen case, as the injury there occurred upon the ship.

The Keator case, *supra,* illustrates the necessity for clearer thinking on this ground. In that matter the injury occurred prior to the passage of the Johnson Amendment. An award of workmen's compensation benefits was annulled by the higher New York courts in 169 N. Y. S., 645, and 120 N. E., 56, upon the authority of the Jensen case. The reason given was that while the injury occurred upon land, the deceased was in maritime employment and the Jensen case governed. Petition for certiorari to this court was denied in 256 U. S., 574. Thereupon suit was brought in admiralty and the case dismissed for want of jurisdiction in 56 Fed., 574, upon the ground that the tort occurring upon the land, admiralty had no jurisdiction. It was there suggested that recourse might be had to the State death statute under the saving clause. Since, however, the New York compensation act is the exclusive remedy, it would seem to follow that the State death statute has been repealed as to all cases included within the apparent scope of the compensation act.

If the case comes to this court, will it reverse the well-established rule that locality is the test of admiralty jurisdiction in matters of tort? Or will it hold that the State workmen's compensation act is not barred for the reason that the injury was non-maritime? Or will it leave a twilight zone in which no law gives relief?

SUMMARY.

It is therefore respectfully submitted that the decision of the Court of Appeals of New York in the instant matter should be affirmed for the following reasons:

I. The Johnson Amendment is constitutional and applicable.

(*a*) It is sustained by the power of Congress to relinquish portions of the legislative and judicial field otherwise granted the United States to the concurrent power of the States.

(*b*) It is sustained by the paramount power of Congress to fix and determine the maritime law.

(*c*) It is sustained by the reasoning of the Jensen case.

(*d*) It is sustained by the actual holdings of *The Lotta-wanna*.

(*e*) It is sustained by the analogy of the Wilson and Webb-Kenyon acts heretofore held constitutional.

(*f*) FINALLY, AND MOST IMPORTANT, IT IS SUSTAINED BY THE UNCHALLENGED EXISTENCE OF THE "SAVING CLAUSE," CONFERRING CERTAIN CONCURRENT LEGISLATIVE AND JUDICIAL POWER ON THE STATES IN MARITIME CASES FOR OVER ONE HUNDRED THIRTY YEARS.

II. The allowance of workmen's compensation benefits in the present case is further sustained, leaving aside the Johnson Amendment, by these considerations:

(*a*) The State law is excluded only because it comes in conflict with maritime law, and the maritime law has no provision for fatal injuries. This is a fatal injury case.

(*b*) The State law is excluded only because it comes in conflict with the maritime law, and the maritime law makes no provision for injuries occurring on shore. The present injury occurred on shore.

Respectfully submitted,

WARREN H. PILLSBURY,
Counsel (as Amicus Curiæ) for the Industrial Accident Commission of the State of California.

APPENDIX A.

An Act

To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save claimants the rights and remedies under the workmen's compensation law of any State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give

it, and to claimants the rights and remedies under the workmen's compensation law of any State."

Passed the Senate October 2, 1917.

Attest:

JAMES M. BAKER,
Secretary.

Passed House, October 5th. Approved October 6th.

APPENDIX B.

65th Congress, 1st Session. Report No. 139.

SENATE.

Amending the Judicial Code.

October 2, 1917.—Ordered to be printed.

Mr. Ashurst, from the Committee on the Judiciary, submitted the following:

REPORT.

(To accompany S. 2916.)

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co. vs. Jensen* (Sup. Ct. Advance Opinions, No. 15, pp. 524-545) that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors

from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any State. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill if enacted will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being a concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

Office Supreme Court, U. S.
FILED
DEC 5 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 543.

KNICKERBOCKER ICE COMPANY
Plaintiff in error,

against

LILLIAN E. STEWART
Defendant in error.

IN ERROR TO THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK,

BRIEF IN BEHALF OF THE STATE INDUSTRIAL COMMISSION

CHARLES D. NEWTON,
Attorney-General.

E. CLARENCE AIKEN,
Deputy Attorney-General.
of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

KNICKERBOCKER ICE COMPANY,
Plaintiff-in-Error,

against

LILLIAN E. STEWART,
Defendant-in-Error.

STATEMENT OF FACTS.

This is a writ of error to review an order of the Court of Appeals of the State of New York, which unanimously affirmed an order of the Appellate Division, Third Department, which in turn unanimously affirmed an award of the State Industrial Commission made to the widow and five children of William M. Stewart, deceased, for his death (fol. 48).

The defendant employer is engaged in the business of manufacturing and dealing in ice, and is a self-insurer under the New York law (fols. 5, 6, 11).

The deceased employee was a bargeman, working on a boat unloading ice at the wharf (fols. 5, 11, 25, 30). At the time in question the employees of the defendant were taking down the rigging on a barge and taking the ice off the boat and the

deceased employee, as he picked up a block of ice, fell over into the river and was drowned (fols. 30, 31). He left a widow and five infant children, to whom an award was made under the provisions of the Workmen's Compensation Law of the State of New York.

POINT I.

THE STATE INDUSTRIAL COMMISSION HAD JURISDICTION TO MAKE THE AWARD IN QUESTION.

The Majority opinion in the case of *Southern Pacific Co.* v. *Jensen,* held that in admiralty and maritime cases jurisdiction vested in the Federal courts because the remedy given by the compensation statute was of character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and, therefore, was not saved to suitors under the saving clause in the act passed by Congress and contained in the Judicial Code. On October 6, 1917, the Judicial Code was amended as follows: " The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.

> " Third of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it *and to claimants the rights and remedies under the workmen's compensation law of any state.*" (Judicial Code, Sec. 256; Sec. 1233 in the new revision.)
>
> " The district courts shall have original jurisdiction as follows:

" Third of all cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it *and to claimants the rights and remedies under the workmen's compensation law of any state;* of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as a prize." (Judicial Code, Sec. 24; Sec. 991 in the new revision.)

(The italics in the above quotations represent the amendments introduced by the Act of October 6, 1917. C. 97, Secs. 1, 2.)

The intended effect of the Amendment is best stated in the report of the Senate Judiciary Committee, as follows:

" 65th Congress, 1st Session. Report No. 139

" SENATE

" AMENDING THE JUDICIAL CODE.

" October 2, 1917 — Ordered to be printed.

" Mr. Ashurst, from the Committee on the Judiciary, submitted the following:

" REPORT.

"(To accompany S. 2916.)

" The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to

claimants the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

" The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, ' saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.'

" It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Jensen* (Sup. Ct. Advance Opinions, No. 15, pp. 524–545) that ' the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.' The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any state. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. *The bill if enacted will not disrupt the admiralty jurisdiction of the Federal Courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters.* Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible

for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being a concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan." (Italics ours.)

The amendment in question has been under consideration in four reported cases. In the case of *Duart* v. *Simmons,* 121 N. E. 10, the Supreme Court of Massachusetts had before it an action for tort for personal injuries in unloading coal from a vessel. It was urged in that case that the plaintiff was confined to the remedies afforded by the Workmen's Compensation Act. As the accident occurred before the passage of the amendment, it was not directly passed upon but the court says:

> "Seemingly the exclusive nature of the Federal jurisdiction has been released as to cases of this sort occurring since October 6, 1917 by U. S. statutes at large. C. 97, Sec. 2, approved on that date amending the Judicial Code of the United States, Sec. 256."

The Supreme Court of Louisiana had this question before it in the case of *Veasy* v. *Peters,* 77 So. Rep. 948, in which it was held that the amendment to the Judicial Code, being remedial in its nature, should have retroactive effect. It, therefore, reversed a former decree which set aside the judgment for compensation and ordered that the judgment appealed from be affirmed.

In the case of the *Steam Lighter Howell,* 252 Fed. Rep. 5[illegible]8, District Judge Learned Hand held that by virtue of the said amendment and the

exclusive nature of the New York Law, that an injured longshoreman was not entitled to prosecute a *libel in rem* against the Steam Lighter Howell. However, the contrary was held by District Judge Bean in the case of *Rohde* v. *Grant Smith Porter Co.*, 259 Fed. Rep. 304.

We have found no case in the lower courts which holds that Congress had no constitutional power to pass said amendment.

It will be noted that in the instant case we have the question of compensation for bargemen in handling ice upon one of the rivers of the country. The New York law does not apply to vessels of other states or countries used in interstate or foreign commerce (Sec. 2, Group 8).

POINT II

CONGRESS HAD JURISDICTION TO ENACT THE AMENDMENT TO THE JUDICIAL CODE, RESERVING THE RIGHTS AND REMEDIES UNDER THE COMPENSATION LAW OF ANY STATE WHERE SUCH RIGHTS AND REMEDIES HAD BEEN GIVEN BY ANY STATE.

In the case of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, decided by the United States Supreme Court, the majority of that court held that the claimant in that case could not proceed under the Compensation Law for the reason that article III, section 2, of the Constitution extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction; and article I, section 8, conferred upon Congress power "to make all of the laws which may be necessary and proper for carrying into

execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Reference might also have been made to subdivision 3 of section 8, which gave Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The majority opinion states:

> "Considering our former opinions, it must be now accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler* v. *Boston & Savannah SS. Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14."

Referring then to section 9 of the Judiciary Act of 1789, which gave to the district courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," it finds that the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, and is not saved to suitors from the grant of exclusive jurisdiction; and also that this remedy is not consistent with the policy of Congress to pass laws with reference to limitation upon the liability to ship owners.

It would, therefore, seem that according to the majority opinion that Congress had the power under the Federal Constitution to define and limit jurisdiction in admiralty cases.

It seems to be true that at the time of the Revolution and previous thereto, the English rule of admiralty jurisdiction was very narrow; that that narrow platform of jurisdiction was only what remained after centuries of strife between the courts of common law, which were jealous of the courts of admiralty.

Since the time of the Revolution there has been in England a move for a revival of the ancient admiralty jurisdiction. In 1840 the first of the so-called of the Admiralty Court Acts was passed, followed in 1846, 1854, 1861 and 1868 by other Acts all tending to give a broader and fuller jurisdiction to the High Court of Admiralty. In 1873 the High Court of Admiralty was united and consolidated with the Superior Courts of Common Law, the Court of Chancery of England, the Court of Probate and the Divorce Court, to form the Supreme Court of Judicature (Benedict's Admiralty, Chap. 7).

Parliament has also provided for workmen's compensation to master seamen, apprentices and members of the crew of any British ship or vessel (Workmen's Compensation Act, 1906, Sec. 7).

Mr. Justice Nelson in the case of *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 47 U. S. 344, 385, says that admiralty jurisdiction in England, at the time of the adoption of our Constitution, was much more narrowly confined that it has been under the laws expounded by the courts of this country since the time of the adoption of the Constitution. The only feature which we have adopted from the English practice was the concurrent jurisdiction of courts of common law and this was safeguarded by the provision in the Constitution itself of the saving clause.

The Admiralty Law of England was originally of much narrower scope as above stated than has been finally settled as law in this country; under the influence of the English jurisdiction admiralty jurisdiction was confined by this court to cases arising upon waters within the ebb and flow of the tide (*The Thomas Jefferson,* 10 Wheat. 428; *Orleans* v. *Phoebus,* 11 Pet. 175). However, in the year 1845, Congress passed an act by which it was intended to extend the admiralty jurisdiction over the Great Lakes, and, apparently doubtful about applying such jurisdiction in all its details to waters so far inland inserted in the act a clause as follows:

> "Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it."

This court in the case of *The Genesee Chief,* 12 How. 443, had under consideration the case of a collision on Lake Ontario. The court in its opinion, delivered by Mr. Chief Justice Taney in that case, held that this law was constitutional on the ground that the lakes are in truth inland seas. A great and growing commerce is carried on upon them; hostile fleets have encountered upon them, and prizes made; and every reason that existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. He adverts to the fact that jurisdiction in England was confined to tide water and that that was so because there was no navigable stream in that country beyond the ebb and flow of the tide; and further, at the time of

the adoption of our Constitution, and, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. Therefore, the courts of the United States naturally adopted the English decisions upon the question of jurisdiction in the case of *The Thomas Jefferson* and *Orleans* v. *Phoebus* (*supra*). He says that decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day. He further says:

> "It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

He then takes up the objection made in England to admiralty jurisdiction of the want of trial by jury and says:

> "But the act of Congress of which we are speaking is free from the objection to which the English statute is liable. Like the the English statute, it saves to the party a concurrent remedy at common law in any

court of the United States or of a State which may be competent to give it. But it goes farther. It secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great and leading objection, always heretofore made to the admiralty jurisdiction.

The power of Congress to change the mode of proceeding in this respect in its courts of admiralty will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it."

Following *The Genesee Chief,* this court sustained the admiralty jurisdiction over rivers

(*The Magnolia*, 20 How. 296; *Hine* v. *Travers*, 4 Wall. 555), and in *Ex parte Boyer*, 109 U. S. 629, and *The Robert W. Parsons*, 191 U. S. 17, held that admiralty also covers the canals of the country.

a. *The Plan and Purpose of the Constitution in Reference to Jurisdiction.*

We could not do better than to quote from the admirable opinion of Mr. Justice Pitney in the case of *Southern Pacific Co.* v. *Jensen* upon this subject, which we think must have been concurred in in this respect as in the majority opinion we have the statement, "considering our former opinions it must now be accepted as settled doctrine that in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country," and this is reasserted in the majority opinion in the case of *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 72. I will, however, quote from several of the cases referred to by Mr. Justice Pitney in said opinion. In the case of *Martin* v. *Hunter's Lessee*, 14 U. S. 326, 327, Mr. Justice Story says:

> "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a

long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests, should require."

Mr. Chief Justice Marshall had occasion to consider the clause of the Constitution which provides for the extension of judicial power to all cases of admiralty and maritime jurisdiction in the early case of *United States* v. *Beavans,* 3 Wheat. 336, 386. In that case a marine, duly enlisted, was indicted and tried for murder on board the United States Ship of War "Independence," as it lay in Boston Harbor. He was tried before a Circuit Court of the United States of the District of Massachusetts, and the question was as to jurisdiction or cognizance of this Circuit Court and the delimitation of that jurisdiction with that of the state. He says:

"What then is the extent of jurisdiction which a state possesses?

We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of

Massachusetts, unless the jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the constitution which declares, that ' the judicial power shall extend to all cases of admiralty and maritime jurisdiction.' The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in favour of, as well as that against the proposition, deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty, over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offence is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts."

* * * * * * * *

" Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 2d article, we are to look for cessions of territory and of exclusive jurisdiction over this district, and over all places purchased by the consent of the legis-

lature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.

It is observable, that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together, without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and martitime jurisdiction, is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have divested Massachusetts of the power to regulate the trade of her bay? ''

The object of the Constitution was to enumerate rather than to define the powers granted. *Gibbons* v. *Ogden,* 9 Wheat. 189, 196; *Passenger cases,* 7 How. 283, 549; *Lottery case,* 188 U. S. 321, 346.

The reason for adopting the general outlines only was well expressed by Chief Justice Mar-

shall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407:

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language."

This is also stated by Mr. Justice Baldwin in the case of *State of Rhode Island* v. *State of Massachusetts*, 12 Peters 657, 721. He says:

> "Our next inquiry will be, whether we have jurisdiction of the subject matters of the suit, to hear and determine them.
>
> That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms, extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. The solution of this question must neeessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the peo-

ple of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the constitution. It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the government of the United States. 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; 1 Wheat. 326; 4 Wheat. 407; leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable, under a constitution of government which made it the duty of the judicial

power to decide all cases in law or equity arising under it, or laws passed, and treaties made by its authority.

By the judiciary act of 1789, the judicial system of the United States was organized, the powers of the different courts defined, brought into action, and the manner of their exercise regulated. The 13th section provided 'That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction.' 1 Story's Laws, 59.

The power of congress to make this provision for carrying into execution the judicial power in such cases, has never been, and we think cannot be questioned; * * *"

The United States Constitution is in effect a mere form or skeleton of government, or a body not instinct with life until made so by congressional legislation. We might apply to it the figurative language which Daniel Webster used with reference to Alexander Hamilton—"He smote the rock of the national resources and abundant streams of revenue gushed forth. He touched the dead corpse of public credit and it sprung upon its feet."

That Congress has authority to define and limit jurisdiction in admiralty cases would seem to follow from its power with reference to other cases. Subdivision 1 of section 2 of article III says that judicial power shall extend to controversies between citizens of different states. Congress, upon this subject of jurisdiction, has provided that the Federal courts only have jurisdiction as

between citizens of different states where the amount in controversy is $2,000; and the United States Supreme Court has refused jurisdiction in cases where that amount was not in dispute.

Holt v. *Indiana Manufacturing Co.*, 176 U. S. 68.

So also

United States v. *Sayward*, 160 U. S. 493, 498.

Even before the amendment to the section of the Judicial Code, Mr. Justice Reynolds, in his opinion, says:

> "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or effected by state legislation. That this may be done to some extent cannot be denied."

He then refers to enforcement of liens upon vessels for repairs and the right given by State statutes to recover in death cases.

To this may be added the cases cited by Mr. Justice Hughes in the *Minnesota Rate Cases*, 230 U. S. 352, at page 403, and the following pages through State regulations of pilotage, harbor, bay and river improvements, bridges, wharfage charges and vessel quarantine, all of which are within State regulation. It also appears in earlier cases which he does not review that States have, with the permission of Congress, exclusive jurisdiction over crimes committed on navigable waters within their boundaries. (*United States* v. *Beavans*, 3 Wheat. 336; *People* v. *Welch*, 141 N. Y. 266); that the States have complete power to protect fisheries (*Manchester* v. *Massachu-*

setts, 139 U. S. 240), oyster beds (*McCreedy* v. *Virginia,* 94 U. S. 391), and sponges (*The Abbey Dodge,* 223 U. S. 166) in public waters of the United States. And since the decision in the *Minnesota Rate Cases* the Supreme Court has sustained the power of a State to compel a railroad doing business as an interstate carrier by land and by water to pay its employees semimonthly (*Erie Railroad Company* v. *Williams,* 233 U. S. 685).

So as to harbor improvements, *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse* v. *Glover,* 119 U. S. 543, 548; *Leovy* v. *United States,* 177 U. S. 621, 625; *Cummings* v. *Chicago,* 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons* v. *Ogden,* 9 Wheat. 1, 203; wharfage charges, *Packet Co.* v. *Keokuk,* 95 U. S. 80; *Packet Co.* v. *Catlettsburg,* 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, 702; *Ouachita Packet Co.* v. *Aiken,* 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands* v. *Manistee River Imp. Co.,* 123 U. S. 288, 295.

So, of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond Ferry* v. *Hudson County,* 234 U. S. 317, 331; or upon vessels plying between two ports located within the same State, *Wilmington Transp Co.* v. *California Railroad Commission,* 236 U. S. 151, 156.

See also *Clark D. Stilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311.

It has been held by the United States Supreme Court that the exception " of saving to suitors,

in all cases, the right of common law remedy, where the common law remedy is competent to give it," did not mean necessarily a common law action but that the remedy might be any means employed to enforce the rights or redress the injury (*Knapp, Stout & Co.* v. *McCaffery*, 177 U. S. 638, 644). Mr. Justice Brown says at page 644:

> "The real question is whether the proceeding taken is within the exception 'of saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.' It was certainly not a common law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as 'the means employed to enforce a right, or redress an injury.' While, as stated by him, remedies for nonfulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent — a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers

of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action."

Rights of action as well as remedies have been created by the different states involving maritime torts which the admiralty law has adopted, and enforcement thereof has been had either in admiralty or the State courts of this State. A statute was passed in New York giving a right of action for death, a right which was unknown to the common law. An action was brought under this statute in the case of *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1, in which it was contended that there was want of jurisdiction in the State court to hear the case as it could not exercise admiralty jurisdiction. Judge Grover in his opinion says:

"The ground upon which the want of jurisdiction is claimed, is that the injury is a maritime tort, and therefore the case comes within the admiralty jurisdiction, which under the Constitution and laws of the United States is exclusively vested in the courts of that government. The State courts can exercise no admiralty jurisdiction. (*The Josephine*, 39 N. Y. 19; *Brookman* v. *Hamill*, 43 id. 554.) But conceding that redress for the injury complained of might have been obtained by proceedings in admiralty, it does not follow that the State courts have no jurisdiction. Section 9 of the judiciary act, passed by Congress in 1789, while vesting exclusive original jurisdiction of all civil causes of admiralty and martime jurisdiction in the District Courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it. Section 1, chapter 29, of the Act of Congress, 1845, by

which the admiralty and maritime jurisdiction of the District Courts is extended to certain lakes and rivers, the jurisdiction of the State courts is preserved by still more comprehensive language, as follows: 'Saving, also, to the parties, the right of a concurrent remedy at the common law, when it is competent to give it, and any concurrent remedy which may be given by the State laws when such steamer or other vessel is employed in such business of commerce and navigation.' The argument against the jurisdiction of the State courts is, that inasmuch as the common law gave no right of action to the personal representatives for the recovery of damages for the pecuniary injury of the next of kin, caused by the death against those whose wrongful act caused it, there was no civil common law remedy for such an injury. This is true. Until a right exists there can be no remedy. But when a right is given, whether by the common law or statute, there must be some remedy when it is withheld. The right of the next of kin to compensation for the pecuniary injury is given by statute, and to enforce it a common law action is given to the personal representatives. It is this common law remedy that is saved in the acts above referred to. This is saved wholly irrespective of the foundation of the right to be enforced, whether upon the common law or statute. The intention of the statute was to confer exclusive admiralty and maritime jurisdiction upon the District Courts, at the same time leaving to the suitor his option of seeking redress at common law when it could be so obtained. This appears from the saving of common law remedies instead of common law rights. The former are preserved to the suitor in all cases, when competent, irrespective of the foundation of the latter, whether upon the common law or statutes.

It is further insisted that jurisdiction is taken away from the State courts by chapter 43, Act of Congress, 1851, limiting the liability of ship-owners and for other purposes. Section 3 of that chapter limits the liability of such owners to the value of the ship and freight then pending. It is obvious that this limited liability can be equally well enforced in a common law action, when, as in the present case, the injury is confined to one party, as though no such limit had been imposed. Section 4 of the act provides the mode to be adopted by the owner in case the injury is to several, and the value of the ship and freight then pending is insufficient to compensate all in full, to stay actions at common law in the State courts. The practice to be pursued for this purpose is discussed and determined in *Norwich Co.* v. *Wright* (13 Wallace 104). No such practice was or could have been adopted by the defendant in the present case, as the injury was sustained by a single party. It follows that the court had jurisdiction to try and give judgment in the case."

This was also the holding of the United States Supreme Court in the case of *Steamboat Co.* v. *Chase*, 83 U. S. 522. In that case Mr. Justice Clifford says:

"Suitors may have a common law remedy in all cases where the common law is competent to give it, but the defendants insist that a suitor cannot have redress in a common law court in such a case, even if the admiralty courts have jurisdiction, as the right of action was created by a State statute enacted subsequent to the passage of the Judiciary Act.

Attempt is made to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were

known to the common law at the time of the passage of the Judiciary Act, and the argument is that the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries prosecuted in the name of the injured party were well known, even in the early history of the common law. Such actions, it must be admitted, did not ordinarily survive, but nearly all the States have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned."

To the same effect also the case of *Sherlock* v. *Alling*, 93 U. S. 99.

In the case of *The Hamilton*, 207 U. S. 398, the question was raised as to whether the statute of the State of Delaware would apply to the claim for death due to negligence occurring upon the high seas. Mr. Justice Holmes, who delivered the opinion of the court, says:

"Apart from the subordination of the State of Delaware to the Constitution of the United States there is no doubt that it would have had power to make its statute applicable to this case."

Later on in the opinion he proceeds:

" The first question, then, is narrowed to whether there is anything in the structure of the National Government and under the Constitution of the United States that takes away or qualifies the authority that otherwise Delaware would possess — a question that seems to have been considered doubtful in *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 558. It has two branches: First, whether the state law is valid for any

purpose, and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction.' Art. 3, Sec. 2; 130 U. S. 557. The doubt in this case arises as to the power of the States where Congress has remained silent.

That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the State courts over torts committed at sea. This, we believe, always has been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262. And as the State courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts, tends to establish the legislative power of the State where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase*, 16 Wall. 522. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore

> or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in *McDonald* v. *Mallory*, 77 N. Y. 546, where the death occurred on the high seas. *Sherlock* v. *Alling*, 93 U. S. 99, reinforces *Chase's case*, and answers any argument based on the power of Congress over commerce."

It appears to be settled, therefore, that the States may create a right and remedy in addition to a common law or admiralty remedy, which right and remedy may be pursued in the courts of the State. The State of New York has created a right and remedy by means of workmen's compensation, which right and remedy were not known to the common law or the law of admiralty and cannot be enforced in either one of those courts.

Without some law passed by the State of New York there would be no remedy to the widow and children of the deceased employee in this case. Admiralty afforded no remedy for death (*The Harrisburg*, 119 U. S. 199). However, where states have passed laws giving a remedy for death due to negligence, admiralty has recognized such remedy (*The Hamilton*, 207 U. S. 398). The State of New York has such a remedial statute in death cases (section 1902 of the Code of Civil Procedure). In the case of an employee, however, that remedy has been suspended by the compensation remedy, which is exclusive (section 11 of Compensation Law), and has been so declared by the Court of Appeals (*Shanahan* v. *Monarch Engineering Co.*, 219 N. Y. 469). Therefore, if the court will not allow the remedy invoked in this

case, this widow and children have no remedy at all.

We suggest that if Congress had the power to save the right to proceed at common law under the Federal government, it had also the right to allow procedure under some other form of remedy. That did not take away the jurisdiction of the admiralty courts or impair their jurisdiction, but allowed another remedy to be used in case one was not efficacious. We can see no difference between the power of Congress to save a common law remedy and one for compensation.

b. THE QUESTION OF UNIFORMITY

Much stress is laid by the majority opinion in the *Jensen* decision and in the brief of plaintiff-in-error in this case upon the uniformity of the maritime law, and both in that decision and in the brief great stress is laid upon certain expressions quoted from the *Lottawanna* case. All that was necessary to decide in the *Lottawanna* case was whether there was an implied lien for necessaries furnished to a vessel in the home port, where no such lien was recognized by the municipal law of the State, and as to whether on that issue the case of *The General Smith*, 4 Wheat. 438, should be overruled. Mr. Justice Bradley, however, undertakes to roam all over the field of admiralty and maritime law in the course of his opinion; and while paragraphs may be picked out to support the contention for a law operating uniformly in the whole country, there are other expressions also which recognize the undoubted power of Congress

to introduce such changes as are likely to be needed. We quote:

> " But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, pecularities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and effects only its own merchants or people in their relations to each other (p. 572). * * *
>
> But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country (p. 574).
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> * * * * * * * *

If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to

introduce such changes as are likely to be needed" (p. 577).

However, with reference to the uniformity of admiralty and maritime law, there is really no question here. Congress is not attempting to disturb the uniformity of the maritime law. Whenever a case is brought in an admiralty court, the admiralty law will be enforced, the same in one State as in another; but wherever there is another remedy by way of workmen's compensation or a common law remedy, such remedies will be asserted and enforced in their respective jurisdictions according to the law of that jurisdiction. So far as the common law remedy is concerned, it cannot be claimed that that is the same the country over. New York has a system of practice under a code. Other states have codes of their own and some states still retain the common law practice and procedure.

This is recognized in the case of *Wheaton & Donaldson* v. *Peters & Grigg*, 33 U. S. 658, where it is stated in the opinion:

> "It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our feudal system, only by legislative adoption.
>
> When, therefore, a common law right is asserted, we must look to the state in which the controversy originated."

We may assume that there is more nearly a uniformity under the compensation laws which have now been passed by forty-two states of the union than there would be under the common law procedure.

In conclusion we say that in the case of *Southern Pacific Co.* v. *Jensen,* counsel for the State was intent on establishing the constitutionality of the Workmen's Compensation Law of New York and counsel for plaintiff-in-error in that case was striving to have it declared unconstitutional. The point upon which the case was finally decided was hardly touched in the briefs on either side, and Mr. Justice Pitney in his opinion points out that until the *Jensen* case the reported decisions of the court show not a trace of any such question raised.

We have then a situation in which bench and bar had assumed that the State courts had concurrent jurisdiction to decide cases where the claimant might also have a remedy in admiralty. In the *Jensen* case five state commissioners, five justices of the Appellate Division, seven judges of the Court of Appeals in New York, and four justices of this court, a total of twenty-one men, held that such concurrent jurisdiction existed, but five justices of this court overruled that decision, declaring the law was unconstitutional in maritime cases.

Now we come before this court again. This time we have the overwhelming majority of the House of Representatives and Senate, in which are many good lawyers, and the approval of the President of the United States. We have, as in

the *Jensen* case, the five commissioners and twelve judges of New York agreed upon the constitutionality of the Act of Congress, the aim and purpose of which is to ameliorate the harsh law of the sea (*The Osceola*, 89 U. S. 158, 175; *Chelentis* v. *Luckenbacher SS. Co.*, 247 U. S. 372).

Admiralty takes no account of permanent disability. It takes no account of dependent widows and children; and in this latter respect the uniformity of admiralty law, upon which so much stress is laid, does not exist. In the waters of a State which by legislation has given a right of action for death, admiralty may adopt that provision of the State statute and afford a remedy for death caused by negligence. In the waters of states which have no such statutes, the remedy is non-existent in admiralty.

If the Legislatures of all the states and the Congress of the United States cannot change a rule of law recently discovered to have been in force in the middle ages (Rules of Oleron, Article VI; Laws of Wisbey, Article 18; *The Osceola*, 189 U. S. 169) and, therefore, now in force, then we may truly say that we ought to go still further back and invoke the laws of the Medes and Persians or the Code of Hammurabi, section 5: "If a judge pronounce a judgment, render a decision, deliver a verdict duly signed and sealed and afterward alter his judgment, they shall call that judge to account for the alteration of the judgment which he had pronounced, and he shall pay twelvefold the penalty which was in said judgment; and in the assembly, they shall expel him from his seat

of judgment, and he shall not return, and with the judges in a case he shall not take his seat."

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General,
Attorney for the State Industrial Commission.

E. C. AIKEN,
Deputy Attorney-General,
Of Counsel.

9

KNICKERBOCKER ICE COMPANY *v.* STEWART.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

No. 543. Argued December 16, 1919.—Decided May 17, 1920.

The Constitution, Art. III, § 2, Art. I, § 8, itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. P. 160.

It took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or work material injury to, characteristic features of that law, or to interfere with its proper harmony and uniformity in its international and interstate relations. *Id.*

To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within the control of the Federal Government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere. *Id.*

There is a distinction between the situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more. P. 161.

That clause of the provision granting otherwise exclusive admiralty and maritime jurisdiction to the federal courts (Judiciary Act, 1789, § 9; Jud. Code, §§ 24, 256), which saves to suitors "in all cases, the right of a common-law remedy, where the common law is competent to give it," refers to remedies for enforcement of the federal maritime law, and does not create substantive rights or assent to their creation by the States. Pp. 159, 161.

The usual function of a saving clause is to preserve something from immediate interference—not to create. P. 162.

The legislature does not alter the law by expressing an erroneous opinion of it. *Id.*

Read with the explanatory report in the Senate and with the light of attendant circumstances, the Act of October 6, 1917, c. 97, 40 Stat. 395, which purports to amend Jud. Code, §§ 24 and 256, by adding to the saving clause "and to claimants the rights and remedies under the workmen's compensation law of any State," is to be construed

as intending to obviate the objections pointed out in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and as seeking to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. Pp. 161, *et seq.*

The attempted amendment is unconstitutional, as being a delegation of the legislative power of Congress and as defeating the purpose of the Constitution respecting the harmony and uniformity of the maritime law. P. 164. *The Hamilton*, 207 U. S. 398, distinguished. P. 166. 226 N. Y. 302, reversed.

THE case is stated in the opinion.

Mr. Frank R. Savidge, with whom *Mr. Frederick M. Thompson* was on the briefs, for plaintiff in error:

Congress has power to amend or create the maritime law which shall prevail throughout the country (*Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14), but that is the limit of its power. It cannot delegate this power to the States, nor authorize the enactment of laws that will destroy the uniformity of the maritime law. *The Lottawanna*, 21 Wall. 558; *Sudden & Christenson* v. *Industrial Accident Comm.*, 188 Pac. Rep. 803.

From what was said in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, it follows that if the new and revolutionary principle of compensation, involving the creation of a liability without fault, hitherto unknown in any system of law, is to be extended to maritime employments, this must be done by a law enacted by Congress establishing a uniform system throughout the country.

And, as stated in the opinion, "the absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

The New York workmen's compensation law, as applied to maritime employments, is also unconstitutional in that an essential part of the law bars rights of action in

admiralty, which cannot be barred by legislation of the States. Employers, upon complying with the law, are given complete immunity from suits to recover for disabilities sustained by their workmen in the course of the employment. The exclusiveness of the law is a most vital feature. *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514.

The whole scheme of the law fails in maritime employments. Compensation is only given by the law if other remedies are barred. If they cannot be barred in admiralty, an anomalous situation exists. The law would be not only enforced but enlarged far beyond the point that any state legislature has attempted to carry the compensation principle. It is not the intent, nor is it the effect of the New York law to give compensation in cases where other liability exists. To hold that the law is constitutional in maritime cases, amends the New York law. It is impossible to enforce it in maritime matters as it stands.

Another view is that expressed in *The Howell*, 257 Fed. Rep. 578, that the remedy is not interfered with, but the underlying cause of action is eliminated, and the remedy becomes inoperative. In view of the great weight of authority the other way, we do not believe that this court will adopt that view.

But one or the other position must eventually be taken. Either the State of New York, and all other States, must be allowed to make this inroad upon the maritime law, or their compensation acts must be held not to apply to maritime employments and to that extent to be invalid and unconstitutional.

That a middle course should be adopted by a construction which would amend the New York law by allowing compensation where the law itself does not give it, namely, in cases where other remedies are not barred, is unthinkable.

Mr. E. Clarence Aiken, Deputy Attorney General of the State of New York, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, was on the brief, for defendant in error:

The Constitution is in effect a mere form or skeleton of government, or a body not instinct with life until made so by congressional legislation. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721. That this is true of the admiralty jurisdiction appears from the manner in which it has expanded in this country from what it was in England before and at the time of the Revolution, and from the opinions of this court touching the power of Congress over it. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344; *The Thomas Jefferson*, 10 Wheat. 428; *The Orleans* v. *Phœbus*, 11 Pet. 175; *The Genesee Chief*, 12 How. 443; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (dissenting opinion); *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Martin* v. *Hunter's Lessee*, 1 Wheat. 326; *United States* v. *Bevans*, 3 Wheat. 336.

That Congress has authority to define and limit jurisdiction in admiralty cases would seem to follow from its power with reference to other cases. Art. III, § 2, cl. 1, says that judicial power shall extend to controversies between citizens of different States, but Congress can confine the actual exercise by prescribing a jurisdictional amount. *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *United States* v. *Sayward*, 160 U. S. 493.

Even before the amendment to the section of the Judicial Code, this court in the *Jensen Case* pointed out the difficulty, if not impossibility, of defining "with exactness just how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied." It then refers to enforcement of liens upon vessels for repairs and the right given by state statutes to recover in death cases.

To this may be added the cases cited in the *Minnesota Rate Cases*, 230 U. S. 352, at p. 403 *et seq.*, involving state regulation of pilotage, harbor, bay and river improvements, bridges, wharfage charges and vessel quarantine. It also appears in earlier cases that States have, with the permission of Congress, exclusive jurisdiction over crimes committed on navigable waters within their boundaries, *United States* v. *Bevans*, 3 Wheat. 336; *People* v. *Welch*, 141 N. Y. 266; complete power to protect fisheries, *Manchester* v. *Massachusetts*, 139 U. S. 240, oyster beds, *McCready* v. *Virginia*, 94 U. S. 391, and sponges, *The Abby Dodge*, 223 U. S. 166, in public waters of the United States. And since the decision in the *Minnesota Rate Cases* this court has sustained the power of a State to compel a railroad doing business as an interstate carrier by land and by water to pay its employees semi-monthly. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685.

So as to harbor improvements, *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse* v. *Glover*, 119 U. S. 543, 548; *Leovy* v. *United States*, 177 U. S. 621, 625; *Cummings* v. *Chicago*, 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; wharfage charges, *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 563; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 702; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288, 295.

So of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond Ferry Co.* v. *Hudson County*, 234 U. S. 317, 331; or upon vessels plying between two ports located within the same State, *Wilmington Transportation Co.* v. *California Railroad Commission*, 236 U. S. 151, 156. See *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

It has been held by this court that the exception

"saving to suitors, in all cases, the right of common-law remedy, where the common law is competent to give it," did not mean necessarily a common-law action but that the remedy might be any means employed to enforce the rights or redress the injury. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644.

Rights of action as well as remedies have been created by the different States involving maritime torts which the admiralty law has adopted, and enforcement thereof has been had either in admiralty or the state courts, *e. g.*, a right of action for death. *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1; *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Sherlock* v. *Alling*, 93 U. S. 99; *The Hamilton*, 207 U. S. 398.

It appears to be settled, therefore, that the State may create a right and remedy in addition to a common-law or admiralty remedy, which may be pursued in the courts of the State. The State of New York has created a right and remedy by means of workmen's compensation, which were not known to the common law or the law of admiralty and cannot be enforced in either of those courts.

We suggest that if Congress had the power to save the right to proceed at common law under the Federal Government, it had also the right to allow procedure under some other form of remedy. That did not take away the jurisdiction of the admiralty courts or impair their jurisdiction, but allowed another remedy to be used in case one was not efficacious. We can see no difference between the power of Congress to save a common-law remedy and one for compensation.

All that was necessary to decide in the *Lottawanna Case* was whether there was an implied lien for necessaries furnished to a vessel in the home port, where no such lien was recognized by the municipal law of the State, and as to whether on that issue the case of *The General Smith*, 4 Wheat. 438, should be overruled. While paragraphs may

be picked out to support the contention for a law operating uniformly in the whole country, there are other expressions which recognize the undoubted power of Congress to introduce such changes as are likely to be needed.

However, with reference to the uniformity of admiralty and maritime law, there is really no question here. Congress is not attempting to disturb it. Whenever a case is brought in an admiralty court, the admiralty law will be enforced, the same in one State as in another; but wherever there is another remedy by way of workmen's compensation or a common-law remedy, such remedies will be asserted and enforced in their respective jurisdictions according to the law there prevailing. So far as the common-law remedy is concerned, it cannot be claimed that that is the same the country over.

We may assume that there is more nearly a uniformity under the compensation laws which have now been passed by forty-two States than there would be under the common-law procedure.

Mr. Mark Ash, by leave of court, filed a brief as *amicus curiæ*.

Mr. Warren H. Pillsbury, by leave of court, filed a brief as *amicus curiæ*.

Mr. Justice McReynolds delivered the opinion of the court.

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson River and drowned—August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York; the Industrial Commission granted an award against the Company for her and the minor children; and both Ap-

pellate Division and the Court of Appeals approved it. 226 N. Y. 302. The latter concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work—*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205—had been extinguished by "An Act To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State," approved October 6, 1917, c. 97, 40 Stat. 395.

The provision of § 9, Judiciary Act, 1789 (c. 20, 1 Stat. 76), granting to United States District Courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . , saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," was carried into the Revised Statutes—§§ 563 and 711—and thence into the Judicial Code—clause 3, §§ 24 and 256. The saving clause remained unchanged until the statute of October 6, 1917, added "*and to claimants the rights and remedies under the workmen's compensation law of any State.*" [1]

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[1] Judiciary Act, September 24, 1789, c. 20, 1 Stat. 73, 76, 77:

Sec. 9. That the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; . . .

Rev. Stats. Sec. 563. The district courts shall have jurisdiction as follows: . . .

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and

In *Southern Pacific Co.* v. *Jensen* (May, 1917), 244 U. S. 205, we declared that under § 2, Article III, of the Constitution ("The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction") and § 8, Article I (Congress may make necessary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our

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on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.

Rev. Stats. Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

The Judicial Code—

Sec. 24. The district courts shall have original jurisdiction as follows: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; . . .

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it.

Act October 6, 1917, c. 97, 40 Stat. 395.

That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdic-

national law applicable to the matters within admiralty and maritime jurisdiction"; also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In *Chelentis* v. *Luckenbach S. S. Co.* (June, 1918), 247 U. S. 372, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such substitution would distinctly and definitely

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tion; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State."

change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In *Southern Pacific Co.* v. *Jensen*, we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.'" "Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In *Union Fish Co.* v. *Erickson*, 248 U. S. 308, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled: "The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of

California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made." See also *The Blackheath*, 195 U. S. 361, 365.

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot

be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman* v. *New York City*, 179 U. S. 552, 557, *et seq.*

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, Article VI, clause 2; *Second Employers' Liability Cases*, 223 U. S. 1, 55. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell*, 257 Fed. Rep. 578, and *Rhode* v. *Grant Smith Porter Co.*, 259 Fed. Rep. 304, illustrate some of the uncertainties. In the

first, the District Court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that State are exclusive and *pro tanto* supersede the maritime law. In the second, the District Court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights, obligations and liabilities of the respective parties must be measured by the maritime law and these cannot be barred, enlarged or taken away by state legislation. Other difficulties hang upon the unexplained words "workmen's compensation law of *any* state."

Moreover, the act only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount federal law—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Statutes, § 372.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record (65th Cong., pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee, copied below,[1]

[1] 65th Cong., 1st sess. Senate Report No. 139. Amending the Judicial Code. October 2, 1917.—Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following Report. [To accompany S. 2916.]

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants

probably indicates the general legislative purpose. And, with this and accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co.* v. *Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities

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the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Jensen* that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any State. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill if enacted will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See *Sudden & Christenson* v. *Industrial Accident Commission*, 188 Pac. Rep. 803.

Congress cannot transfer its legislative power to the States—by nature this is non-delegable. *In re Rahrer*, 140 U. S. 545, 560; *Field* v. *Clark*, 143 U. S. 649, 692; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214.

In *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.

S. 311, notwithstanding the contention that it violated the Constitution—Article I, § 8, clause 3—this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one State into another when intended for use contrary to the latter's laws. Among other things, it was there stated that "the argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress," i. e., Congress itself forbade shipments of a designated character. And further: "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest," i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less. "We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." See *Delamater* v. *South Dakota*, 205 U. S. 93, 97.

Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In *The Hamilton*, 207 U. S. 398, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a State to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Southern Pacific Co.* v. *Jensen*, *supra*. The doctrine of *The Hamilton* may not be extended to such a situation.

The judgment of the court below must be reversed and the cause remanded with directions to take further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HOLMES, dissenting.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, the question was whether there was anything in the Constitution or laws of the United States to prevent a State from imposing upon an employer a limited but absolute liability for the death of an employee upon a gang-plank between a vessel and a wharf, which the State unques-

149. HOLMES, PITNEY, BRANDEIS and CLARKE, JJ., dissenting.

tionably could have imposed had the death occurred on the wharf. A majority of the Court held the State's attempt invalid, and thereupon, by an Act of October 6, 1917, c. 97, 40 Stat. 395, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087. Those sections in similar terms declared the jurisdiction of the District Court and the exclusive jurisdiction of the Courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation law of any State." I thought that claimants had those rights before. I think that they do now both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction," Const. Art. III, § 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced and cannot have been elicited by logic alone from the mediæval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the

several States—a not unfamiliar form of law. *Gibbons* v. *Ogden*, 9 Wheat. 1, 207; *Hobart* v. *Drogan*, 10 Pet. 108, 119; *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318; *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 84, 85; *Franklin* v. *United States*, 216 U. S. 559; *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303. An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore if it were necessary, the words "rights and remedies under the workme..'s compensation law of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See *United States* v. *Paul*, 6 Pet. 141. Taking the act as so limited it is to be read as if it set out at length certain rules for New York, certain others more or less different for California, and so on. So construed the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument so far as I now remember, are duties, imposts and excises, naturalization and bankruptcy, in Article I, § 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is required from the express requirement of equality in the Fourteenth Amendment seems to me extravagant. Indeed it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common-law remedy adopted the common law of the several States within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530–534. *Knapp, Stout & Co. Company* v. *McCaffrey*, 177 U. S. 638, 645, 646. *Rounds* v. *Cloverport Foundry & Machine*

Co., 237 U. S. 303, 307. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs. See *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9.

I thought that *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it. But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common-law practice, &c., in the District Courts to "conform, as near as may be, to the practice," &c., "existing at the time" in the State Courts. Rev. Stats., § 914. This was held by the unanimous Court to be binding in *Amy* v. *Watertown, No. 1*, 130 U. S. 301. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 207, 208; *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318. I have mentioned the scope given to the saving of a common-law remedy and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of

want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Constitution, "The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction" prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act—if not in its present form, at least in the form in which it stood on October 6, 1917. I am of opinion that the New York law at the time of the trial should be applied and that the judgment should be affirmed.

MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this opinion.